No.

Office Supreme Court

In the

United States Court of Appeals

For the Seventh Circuit

No. 12094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL DE LUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Walter J. La Buy,
Trial Judge.

APPENDIX FOR DEFENDANT-APPELLANT.

(Contempt Proceedings.)

WM. SCOTT STEWART,
77 W. Washington St.,
Chicago 2, Illinois,
Attorney for Defendant-Appellant.

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1 IN THE UNITED STATES DISTRICT COURT,

Northern District, Eastern Division.

United States of America *vs.* Paul DeLucia.	Contempt Honorable Walter J. LaBuy, Trial Judge.

The deposition of Paul DeLucia was filed February 2, 1957. Motion to compel answers to oral interrogatories was filed February 28, 1957. Paul DeLucia was ordered by Judge Walter J. LaBuy on March 3, 1957 to answer oral interrogatories within three days. On April 3, 1957 the United States Attorney made an oral motion for criminal contempt order and ruling was reserved. On the same day the defendant filed his sworn answer and brief in opposition to motion for rule to show cause. On April 8, 1957, plaintiff's motion for rule to show cause was entered and deferred until after trial of cause. On June 7, 1957 plaintiffs motion for rule to show cause why defendant should not be punished for contempt of court was allowed and leave was granted defendant to file answer. Sworn answer was filed by defendant on June 11, 1957. On the same day, June 11, 1957, defendant was adjudged guilty of contempt and was fined $500. Execution was stayed pending appeal. Notice of appeal was filed June 11, 1957. The defendant was not arrested, bail was not taken; nor was property attached.

2 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of Monday, being the 3rd day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Seven and of the Independence of the United States of America, the 181st Year.

Present:

Honorable John P. Barnes, Chief District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. LaBuy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Tuesday, June 11, 1957.

Court met pursuant to adjournment.

Present: Honorable Walter J. LaBuy, Trial Judge.

3 UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

NOTICE.

(Filed Feb. 28, 1957. Roy H. Johnson, Clerk.)

To: William Scott Stewart, Attorney At Law,
77 W. Washington Street, Chicago, Illinois.

Please Take Notice that on Thursday, February 28, 1957, at 10:00 A. M., or as soon thereafter as counsel may be heard, I will move the Honorable Walter J. LaBuy, Judge of the United States District Court for the Northern District of Illinois, for an order requiring Paul DeLucia also known as Felice DeLucia, defendant in the above entitled case, to answer the oral interrogatories set out in the affidavits of John H. Bickley, Jr., and the certificates of Popkin Simonian, a notary public, attached to the motions as Exhibit A and Exhibit B, respectively, a copy of which is hereunto annexed and made a part hereof.

R. Tieken,
United States Attorney.
Attorney for Plaintiff.

4 UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

MOTION TO COMPEL PARTY TO ANSWER ORAL INTERROGATORIES ON DEPOSITION.

Plaintiff, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, moves the court for an order requiring Paul DeLucia also known as Felice DeLucia, defendant herein, to answer oral interrogatories propounded to the said Paul DeLucia also

known as Felice DeLucia during the course of his examination upon the taking of his deposition before Popkin Simonian, a Notary Public in and for the State of Illinois, County of Cook, at Chicago, Illinois, on the 20th day of February, 1957, which said interrogatories said Paul DeLucia also known as Felice DeLucia refused to answer as more fully appears from the affidavit of John H. Bickley, Jr., Assistant United States Attorney, and the certificate of the notary public, Popkin Simonian, hereto annexed as Exhibits A and B, respectively.

R. Tieken,
United States Attorney,
Attorney for Plaintiff.

5 Exhibit A.

UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

AFFIDAVIT IN SUPPORT OF MOTION.

State of Illinois, }
County of Cook. } ss.

John H. Bickley, Jr., being first duly sworn, on his oath says:

1. I am an Assistant United States Attorney assigned the prosecution of the above entitled cause on behalf of the United States of America, plaintiff herein.

2. There is pending in the United States District Court for the Northern District of Illinois, a certain action, wherein United States of America is plaintiff and Paul DeLucia also known as Felice DeLucia is defendant.

3. Notice of the taking of the deposition of Paul DeLucia also know nas Felice DeLucia was served upon

his attorney, William Scott Stewart, 77 West Washington Street, Chicago, Illinois, on the 14th day of February, A.D. 1957, by mail, pursuant to the Federal Rules of Civil Procedure, stating that the deposition would be taken on February 20, 1957, at 2:00 P. M., before Patrick J. Sullivan, a Notary Public, in and for the County of Cook and State of Illinois, in Room 450, United States Court House, 219 South Clark Street, Chicago 4, Illinois, a copy of the notice of deposition is attached to this motion and marked Exhibit C,

6 4. The defendant, Paul DeLucia also known as Felice DeLucia, attended, was duly sworn by Popkin Simonian, a Notary Public, and was examined by John H. Bickley, Jr., Assistant United States Attorney, on behalf of the plaintiff, United States of America. During the course of the examination, he asked the defendant Paul DeLucia also known as Felice DeLucia, the following questions, and on the advice of his attorney William Scott Stewart, and also on his own initiative the defendant refused to answer the questions on the basis of the Fifth Amendment to the Constitution of the United States, asserting that to answer the same would tend to incriminate him.

A. Paul DeLucia.

Q. Where do you live, sir?

A. 1515 Bonnie Brae, River Forst.

Q. Mr. DeLucia, on January 9, 1925, did you file with the Clerk of the Circuit Court of Cook County a declaration of intention, No. 162822, to become a citizen of the United States of America under the name of Paul Maglio?

A. I respectfully refuse to answer. I don't want to be witness against myself, and I will declare the privilege of the Fifth Amendment.

Q. And at this time, you honestly believe that if you answered that question, you would tend to incriminate yourself?

A. I refuse to answer.

Mr. Stewart: He refuses to answer that question, too.

Mr. Bickley: Q. Mr. DeLucia, on February 21, 1928, did you cause to be filed with the District Director of Naturalization in the Federal Building, Chicago, Illinois, your preliminary form for petition for naturalization, No. 370-55072, under the name of Paul Maglio?

7 A. I refuse to answer for the same reason.

Q. Do you honestly believe that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Did you, on April 10, 1928, file with the Clerk of the United States District Court of Chicago, Illinois, your petition for naturalization under the name of Paul Maglio?

A. I refuse to answer for the same reason.

Q. Now, on April 10, Mr. DeLucia, 1928, did you attend a hearing on your petition for naturalization whereat, and while under oath, you declared that you wanted to change your name from Paul Maglio to Paul DeLucia?

A. I refuse to answer for the same reason.

Q. And at that same hearing, did you state under oath that you had never been arrested or convicted of any offense whatsoever?

A. I refuse to answer for the same reason.

Q. And you honestly think that the answers to those questions would tend to incriminate you; is that correct?

A. I refuse to answer for that reason.

Q. Were you admitted on September 27, 1928, to citizenship by the United States District Court of the United States, of the Northern District of Illinois?

A. I refuse to answer for the same reason.

8 Q. Did you receive in pursuance to the action of the Court, the certificate of naturalization No. 2827322?

A. I refuse to answer for the same reason.

Q. When were you born, Mr. DeLucia?

A. I refuse to answer for the same reason.

Q. Do you honestly think that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Were you indeed not born on November 14, 1897?

A. I refuse to answer for the same reason.

Q. What was your name at the time of birth?

A. I refuse to answer for the same reason.

Q. Was it not Felice DeLucia?

A. I refuse to answer for the same reason.

Q. Do you honestly believe that answering the last two questions there would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Where were you born, sir?

A. I refuse to answer for the same reason.

Q. What was your father's name?

A. I refuse to answer for the same reason.

Q. What was your mother's name?

A. I refuse to answer for the same reason.

Q. What was your grandfather's name, on your father's side?

A. I refuse to answer for the same reason.

Q. And your grandmother's name on your father's side?

A. I refuse to answer for the same reason.

Q. And you honestly believe that answering those questions would tend to incriminate you; is that correct?

A. I refuse to answer for the same reason.

Q. Did you have any brothers, Mr. DeLucia?

A. I refuse to answer for the same reason.

Q. You had four sisters; isn't that correct?

A. I refuse to answer for the same reason.

Q. Would you state your sisters' names?

A. I refuse to answer for the same reason.

Q. You honestly believe that in answering that question you would tend to incriminate yourself?

A. I refuse to answer for the same reason.

Q. You have a sister named Emilia Beatrice DeLucia; do you not?

A. I refuse to answer for the same reason.

Q. She was born on December 8, 1898?

A. I refuse to answer for the same reason.

Q. Do you have a sister named Anna Clementina, born on March 13, 1901?

A. I refuse to answer for the same reason.

Q. Do you have a sister named Clementina DeLucia, born May 23, 1905?

A. I refuse to answer for the same reason.

Q. Do you have a sister named Luisa DeLucia, born March 4, 1907?

A. I refuse to answer for the same reason.

Q. You honestly believe that answering those last four questions, the answers thereto, would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Were you convicted at the age of 17, Mr. DeLucia, on May 18, 1917, in the Common Assize Court of Naples, Italy, of the crimes of voluntary homicide on the person of one Emilio Perillo, carrying a gun without a license, and violating the law on Government concessions, said crimes having been committed on July 17, 1915?

A. I refuse to answer for the same reason.

Q. As a result of the conviction that I mentioned previously, sir, were you sentenced to imprisonment to two years, six months, and 16 days, and fined 145 Lire?

A. I refuse to answer for the same reason.

Q. You honestly believe that in answering those questions the answers thereto might incriminate you; is that correct?

A. I refuse to answer for the same reason.

Q. Were you convicted in absentia, sir, on June 30, 1924,

by the Third Special Assize Court of Naples, Italy, for the crime of voluntary Homicide on the person of Vincenzo Capasso?

A. I refuse to answer for the same reason.

Q. Were you convicted on the aforesaid date of carrying a gun without a license and violating the law on Government concessions?

A. I refuse to answer for the same reason.

11 Q. All of these crimes that I have referred to in the last two questions were committed on June 17, 1920?

A. I refuse to answer for the same reason.

Q. And you honestly believe that in answering the latter two questions, that the answers thereto, would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Now, Mr. DeLucia, as a result of the convictions that I referred to, allegedly committed at an age of 22, and conviction entered on June 30, 1924, in absentia, were you sentenced to 21 years and 10 days imprisonment, and fined 207 Lire?

A. I refuse to answer for the same reason.

Q. You served two years and six months and 16 days as a result of the first conviction that I talked about; that is the voluntary homicide on one Emilio Perillo?

A. I refuse to answer for the same reason.

Q. You were never imprisoned, you were never imprisoned?

A. I refuse to answer for the same reason.

Q. Are you presently married, sir?

A. I refuse to answer for the same reason.

Q. Is your wife's name Nancy Gigante?

A. I refuse to answer for the same reason.

Q. Referring to the second conviction, that I talked about before, that was entered in absentia, have you taken any steps in recent years to set aside that conviction or lift the warrant of arrest that was outstanding?

A. I refuse to answer for the same reason.

12 Q. When were you married, sir, first?

A. I refuse to answer.

Q. By that, I mean the civil ceremony?

A. I refuse to answer for the same reason.

Q. Were you married in a civil ceremony to Nancy Gigante on January 3, 1927, in Chicago, Illinois, by Judge Joseph W. Schulman?

A. I refuse to answer for the same reason.

Q. Were you married in a church ceremony on January 30, 1927, to Nancy Gigante at Holy Guardian Angel Church in Chicago, Illinois?

A. I refuse to answer for the same reason.

Q. And you honestly believe that the answers to the last two questions would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Did you execute a depositor's card on September 8, 1927, with the First National Bank of Chicago, savings?

A. Did I what?

Q. Did you execute a depositor's card on September 8, 1927, with the First National Bank of Chicago?

A. I refuse to answer for the same reason.

Q. Were you, at that time, residing at 917 Blue Island Avenue, Chicago, Ill.?

A. I refuse to answer for the same reason.

Q. Have you ever resided at 917 Blue Island Avenue?

A. I refuse to answer for the same reason.

Q. You honestly believe that the answers to the last two questions would tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Did you claim at the time of the execution
13 of the depositor's card that you were, at that time, a theater manager?

A. I refuse to answer for the same reason.

Q. Have you ever been a theater manager?

A. I refuse to answer for the same reason.

Q. Did you ever manage the Dante Theater here in Chicago?

A. I refuse to answer for the same reason.

Q. You honestly believe the answers thereto would tend to incriminate you; is that right?

A. I refuse to answer for the same reason.

Q. Did you ever execute an application for beneficial membership in the Italo-American National Union for insurance?

A. I refuse to answer for the same reason.

Q. Did you execute such application in the amount of $1500 on November 25, 1932?

A. I refuse to answer for the same reason.

Q. Did you ever reside at 410 South Austin, Oak Park, Illinois?

A. I refuse to answer for the same reason.

Q. Did you reside at that aforesaid address on November 25, 1932?

A. I refuse to answer for the same reason.

Q. Did you ever apply for any additional insurance in the Italo-American National Union, in particular on January 15, 1934?

A. I refuse to answer for the same reason.

Q. Was that application in the amount of $5,000?

A. I refuse to answer for the same reason.

14 Q. Did you reside at that time at 410 South Austin, Oak Park, Illinois?

A. I refuse to answer for the same reason.

Q. Did you ever submit an application for insurance with the North Western National Life Insurance Company?

A. I refuse to answer for the same reason.

Q. That company is located in Minneapolis, Minnesota. Did you execute such application on November 22, 1935?

A. I refuse to answer for the same reason.

Q. Do you have a $10,000 life insurance policy with that company?

A. I refuse to answer for the same reason.

Q. Mr. DeLucia, when did you first come to Chicago, sir?

A. I refuse to answer for the same reason.

Q. Now, on your petition for naturalization, you said you came to Chicago in 1920; is that correct?

A. I refuse to answer for the same reason.

Q. And you honestly believe the answers to those questions might tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Did you list on your petition of naturalization, at the time of the execution of it, that you lived at 905 South Halsted Street, Chicago, Illinois?

A. I refuse to answer for the same reason.

Q. Did you claim at the time you executed the petition for naturalization that you were a restaurant manager?

A. I refuse to answer for the same reason.

Q. Did you ever state that you were born on July 10, 1898, sir?

A. I refuse to answer for the same reason.

15 Q. Did you ever say you were born at Apricena?

A. I refuse to answer for the same reason.

Q. From what country did you immigrate to the United States?

A. I refuse to answer for the same reason.

Q. That was France, wasn't it?

A. I refuse to answer for the same reason.

Q. And it was about the 1st day of August 1920?

A. I refuse to answer for the same reason.

Q. And you came to the United States in the vessel Ryndam, on or about August 10, 1920?

A. I refuse to answer for the same reason.

Q. And you honestly believe that the—that in answering those questions the answers thereto might tend to incriminate you?

A. I refuse to answer for the same reason.

Q. When did you reside at 4920 West Monroe Street?

A. I refuse to answer for the same reason.

Q. Now, Mr. DeLucia, you registered for the draft on February 16, 1942; is that not correct?

A. I refuse to answer for the same reason.

Q. Did you ever register for the draft?

A. I refuse to answer for the same reason.

Q. Did you ever give your home address as 812 North Lathrop Avenue, River Forest, Illinois?

A. I refuse to answer for the same reason.

16 Q. Do you live now at 1515 Bonnie Brae, River Forest, Illinois?

A. Yes.

Mr. Stewart: Yes, you can give them that.

The Witness: Yes.

Mr. Bickley: I see.

Q. Now, directing your attention to on or about December 22, 1943, were you found guilty of violation of Section 428, Title 18, United States Code?

I am referring now to the trials that were had in the Southern District of New York, and were you sentenced by the District Court for the Southern District of New York, to ten years imprisonment and ten thousand dollars fine?

A. I refuse to answer for the same reason.

Q. Now, of that sentence that I just referred to, did you perform part of that sentence in the Federal penitentiary at Atlanta, Georgia?

A. I refuse to answer for the same reason.

Q. And did you perform the remainder of the sentence at the Federal penitentiary at Leavenworth, Kansas, prior to your parole?

A. I refuse to answer for the same reason.

17 Q. Are you the same man that received the parole?

A. I refuse to answer for the same reason.

Q. Have you ever been in a Federal penitentiary?

A. I refuse to answer for the same reason.

Q. You honestly believe that the answers thereto might tend to incriminate you?

A. I refuse to answer for the same reason.

Q. Have you ever used the alias-name of Paul Ricca?

A. I refuse to answer for the same reason.

Q. Have you ever used the alias name of Paul Viela?

A. I refuse to answer for the same reason.

Q. Were you arrested by the Chicago Police Department on January 23, 1927, on the charge of general principles?

A. On the charge of what?

Q. On the charge of general principles under the name of Paul Viela?

A. I refuse to answer for the same reason.

Q. Now, Mr. DeLucia, did you testify before the Special Committee to investigate organized crime in interstate commerce in the United States Senate, Washington, D. C., on December 9, 1950?

A. I refuse to answer for the same reason.

Q. And did you testify before the Special Committee to investigate organized crime in interstate commerce of the United States Senate at Chicago, Illinois, on October 6, 1950?

A. I refuse to answer for the same reason.

Mr. Bickley: Off the record.

(Discussion off the record.)

Mr. Bickley: Q. Mr. DeLucia, some of the matters that I have asked you here today, you have previously testified about under oath.

Do you wish to change your answers to any of the questions which I have asked you today?

A. I refuse to answer for the same reason.

Q. I take it then that you refuse to answer any and all questions which might be propounded to you; is that correct?

A. I refuse to answer for the same reason.

Q. Did you ever claim, sir, that your mother's name was Terrelli Annunziata Maria?

A. I refuse to answer for the same reason.

Mr. Bickley: Off the record.

(Discussion off the record.)

19 Mr. Bickley: Q. Mr. DeLucia, do you know a man by the name of Raphael Perillo?

A. Who?

Q. Raphael Perillo?

A. I refuse to answer for the same reason.

Q. Now, you have a sister by the name of Emilia, don't you?

A. I refuse to answer for the same reason.

Q. Was your sister Emilia and your father, Antonio, ever indicted for, or brought to trial on a charge of voluntary homicide on the person of Raphael Perillo?

A. I refuse to answer for the same reason.

Q. Were these people that I mentioned, in fact, your father and mother?

A. I refuse to answer for the same reason.

Q. Have you ever claimed that you had a father with the name of Antonio and a sister by the name of Emilia?

A. I refuse to answer for the same reason.

Mr. Bickley: That is all for this deposition.

Further Deponent Saith Not.

20 5. Affiant further states that it was material to the issues and well known to the defendant and the counsel for the defendant that the questions were material to the issues in this cause.

This affidavit is made in support of a motion to compel Paul DeLucia also known as Felice DeLucia, defendant herein, to answer the above set forth questions.

John H. Bickley, Jr.,
Assistant United States Attorney.

Subscribed and sworn to before me this 26th day of February, A.D. 1957.

Angela R. Berg,
(Seal) *Notary Public.*

21 Exhibit B.

United States District Court.
(Caption—56-C-1676)

CERTIFICATE OF OFFICER UPON REFUSAL TO ANSWER ORAL INTERROGATORIES ON DEPOSITION.

I, Popkin Simonian, a notary public, before whom the deposition of Paul DeLucia also known as Felice DeLucia was taken in the above entitled cause on behalf of the plaintiff, certify that Paul DeLucia also known as Felice DeLucia was duly sworn by me and was examined by John H. Bickley, Jr., attorney for the plaintiff, and that in the course of said examination said attorney for the plaintiff asked the witness the questions attached hereto. The defendant, Paul DeLucia also known as Felice DeLucia refused to answer the aforesaid questions on the grounds that to do so would deprive him of his rights under the Fifth Amendment to the Constitution of the United States and would tend to incriminate him.

Popkin Simonian,
Notary Public.

Dated at Chicago, Illinois, this 26th day of February, A.D. 1957.

41 UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

MOTION.

(Filed Apr. 8, 1957. Roy H. Johnson, Clerk.)

Now comes the plaintiff, United States of America, by its attorney, R. Tieken, United States Attorney for the Northern District of Illinois and moves this Honorable Court to enter a rule on the defendant, Paul De Lucia also known as Felice De Lucia, to show cause why he should not be held in contempt of this court.

It is further moved that the rule be made returnable on the morning of April 10, 1957, at 10:00 A. M., or as soon thereafter as counsel may be heard.

R. Tieken,
United States Attorney.

JHBjr:ge

42 State of Illinois, } ss.
County of Cook. }

(Caption—56-C-1676)

AFFIDAVIT.

(Filed Apr. 8, 1957. Roy H. Johnson, Clerk.)

John H. Bickley, Jr., Assistant United States Attorney for the Northern District of Illinois, Eastern Division, being first duly sworn, on oath deposes and states as follows:

1. That on March 27, 1957, this Honorable Court filed a memorandum in the above entitled case which contained therein an order on the defendant, Paul De Lucia also known as Felice De Lucia, to answer oral interrogatories

posed at the taking of his deposition on February 20, 1957, within three days from the date thereof.

2. That in order for the defendant to comply with the court's order, the defendant would of necessity have to appear either before the official court reporter and answer the questions propounded or file with the Clerk of this Honorable Court answers to the questions posed at the deposition on or before 5:30 P. M., April 1, 1957.

43 3. That on March 28, 1957, I called the office of counsel for the defense, Mr. William Scott Stewart, and asked Mr. Stewart when he intended to bring the defendant in and answer the questions and thus comply with the court order. Mr. Stewart advised that he was not sure from reading the court order that he had to produce the defendant to answer the questions or whether he could merely file answers thereto with the Clerk of this Honorable Court, but in any event stated: "I have told the Judge what our position is in the matter. We do not intend to answer these questions—I am not going to bring the defendant in, nor file any answers thereto and it appears that the next move is up to you."

4. That up to and including the present date, the defendant has failed to answer the questions propounded at the deposition, has failed to file with the Clerk of this Honorable Court answers to the questions posed at the deposition and has wilfully refused to comply with the order of this court entered March 27, 1957, in any manner.

John H. Bickley, Jr.,
Assistant United States Attorney.

Subscribed and sworn to before me this 8th day of April, A. D. 1957.

Angela R. Berg,
Notary Public.

(Seal)

44 IN THE UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

Monday, April 8, 1957.

Present: Honorable Walter J. LaBuy, District Judge.

This day come the parties by their counsel and plaintiff by its counsel enters its motion for rule to show cause and by agreement of the parties by their counsel it is

Ordered that ruling be and the same hereby is deferred until after the trial of this cause.

45 IN THE UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

Monday April 8, 1957.

Present: Honorable Walter J. LaBuy, District Judge.

This cause this day being called for trial come the parties by their counsel and the defendant by his counsel enters his motion for reconsideration of Court's ruling with respect to order requiring defendant to answer oral interrogatories and the court being fully advised it is

Ordered that said motion be and the same hereby is denied and the plaintiff by its counsel enters its motion for order under Rule 37(b)(2)(i), Federal Rules of Civil Procedure and the Court being fully advised it is

Further Ordered that said motion of plaintiff be and the same hereby is denied and on motion of plaintiff by counsel it is

Further Ordered that all witness subpoenas served herein be and the same hereby are continued from day to day during the pendency of this trial and the issues being joined herein the trial proceeds and during the hearing of

plaintiff's evidence the hour of adjournment having arrived it is

Further Ordered that the trial of this cause be and the same hereby is adjourned to April 9, 1957.

451 UNITED STATES DISTRICT COURT.

(Caption—56-C-1676)

Friday, June 7, 1957.

Present: Honorable Walter J. LaBuy, District Judge.

Upon due consideration the Court being fully advised having this day filed its Memorandum Opinion it is

Ordered that said Memorandum of the Court shall constitute findings of fact and conclusions of law and it is

Further Ordered that leave be and hereby is granted to plaintiff to present appropriate judgment order within ten (10) days and that plaintiff's motion for rule to show cause why defendant should not be punished for contempt of Court be and the same hereby is allowed and that leave be and hereby is granted to defendant to file answer within 10 days.

46 IN THE UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

ANSWER OF DEFENDANT.

And Brief for Defendant In Opposition to Government Motion to Punish Defendant for Refusal to Answer Questions.

(Filed June 11, 1957. Roy H. Johnson, Clerk.)

47 Answer of Defendant.

Now comes Paul DeLucia defendant in the above entitled cause and makes answer in the matter of the motion of the Government to have the Court punish this defendant for refusal to answer certain questions.

First, as is shown by the transcript, this defendant objected to being sworn as a witness on the ground that until this defendant elected to take the stand the Government had no right to call this defendant as a witness. Now
48 this defendant answering requests Your Honor to hold as a matter of law that the plaintiff had no right to call defendant as a witness over objection.

Second, in refusing to answer the questions put to this defendant orally by the United States Attorney, as is shown by the transcript, this defendant, acting upon the advice of counsel, claimed the privilege guaranteed by the Fifth Amendment. This defendant has refused to answer although ordered to do so for the same reason and with all due respect. This defendant answering further states that he had no intention to belittle, degrade, obstruct, interrupt, prevent or embarrass the Court in the administration of justice. That the situation was really created by the United States Attorney; having been informed that this defendant intended to claim privilege, in persisting in asking over

one hundred questions. This defendant answering further respectfully represents that it was necessary for him to claim the protection of the Constitution and that he was well within his rights and therefore not in contempt of this Honorable Court. Counsel has furnished herewith some of the reasons for the advice given and this defendant respectfully supports this answer with the brief and argument of his attorney. On the basis of the surrounding circumstances and background here shown to the Court as well as the facts within his own personal knowledge, this defendant avers that he had a real fear that the answers to the questions asked would incriminate him of a federal offense.

Paul DeLucia,

Defendant.

State of Illinois
Cook County

Paul DeLucia being first sworn states that the above answer is true.

Paul DeLucia.

Subscribed and sworn to before me this June 10, 1957.

Mildred R. Lesnig,

(Seal) *Notary Public.*

49 Statement.

The Government submitted three motions. Two of them require no further attention at this time.*

As to the third motions, Your Honor ordered DeLucia to answer the oral interrogatories posed at his deposition within three days. The defendant is unable to answer the questions for fear of waiving the privilege against self incrimination. It is respectfully submitted that Your

* For the convenience of the Court and the parties we have printed and appended the Memorandum decision and its supplement.

Honor should determine as a matter of law that in refusing to answer, DeLucia was within his rights and therefore should not be punished for contempt. As the law required Your Honor to pay some heed to the situation DeLucia finds himself to be in, including background and surrounding circumstances we submit herewith a printed copy of an indictment recently returned against DeLucia in No. 57 C.R. 154, accompanied by various motions supported by the affidavit of a co-defendant. This affidavit incorporates certain printed transcripts of Congressional hearings submitted herewith. All of this material is filed herewith with the respectful suggestion that it may be helpful in understanding the scope of the inquiry made by Mr. Bickley in the deposition hearing. The questions asked by Mr. Bickley were printed on behalf of the defendant as an appendix to the Brief for Defendant heretofore filed in opposition to the Government Motion to Strike our Answer.

50 Brief.

I.

The Fifth Amendment declares in part that "No person * * * shall be compelled in any criminal case to be a witness against himself." This guarantee against testimonial compulsion, like other provisions of the Bill of Rights "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law, and that in its attainment other social objects of a free society should not be sacrificed." *Feldman* v. *United States*, 322 U.S. 487, 489. This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562; *Arndstein* v. *McCarthy*, 254 U.S. 71, 72-73.

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Blau* v. *United States*, 340 U.S. 159. * * * However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to establish a claim in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960. * * * The ends of justice re-
51 quire discharge of one having such right whenever facts appear sufficient to sustain the claim of privilege.

Hoffman v. *United States*, 341 U.S. 479, 485.

II.

The privilege may be claimed in a civil case.

McCarthy v. *Arndstein*, 262 U.S. 355.

See Supplemental memo by Judge LaBuy here in appendix.

III.

Where a witness is asked a series of questions some of which properly relate to the charge while others do not and the witness claims his constitutional privilege and refuses to answer any of the questions he cannot be adjudged

guilty of contempt under a rule to show cause why he should not answer all of the questions.

People v. *Boyle*, 312 Ill. 586.
People v. *Newmark*, 312 Ill. 625.

IV.

A sufficient initiary accusation or affidavit in proceedings to punish contempts committed out of the presence of the court is generally held to be jurisdictional.

17 C.J.S. § 72, p. 88.
See Rule 42 Federal Rules of Criminal Procedure.
Carlson v. *United States*, 209 F. (2d) 209.
Wong Gin Ying v. *United States*, 231 F. (2d) 776.
Silva v. *United States*, 227 F. (2d) 74.
Matusow v. *United States*, 229 F. (2d) 335.

52 Argument.

May It Please the Court:

A defendant should be allowed to choose as to whether he will testify or not.

The legal question presented by the objection made by the defendant to becoming a witness at all was argued in a previous brief submitted by the defense in this case.

The *Costello Case*.

We quote from the Memorandum prepared by Your Honor:

> "The Court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States* v. *Costello*, (D.C.N.Y., 1954) 16 F.R.D. 428, Aff'd (C.A., 2, 1955) 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig* (D.C.N.Y., 1954), 16 F.R.D. 137."

Upon reconsideration we trust that Your Honor will decide that the *Costello* case is not in point here. In the case at bar, DeLucia was asked 109 questions. Costello was not in such a bad situation as that confronting DeLucia, or if he was his lawyers failed to acquaint the Trial Judge with the danger involved in any answers to the questions put to Costello. In the case at bar, we had pointed out to Your Honor reasons for concluding that DeLucia is in real danger and we incorporate additional reasons here in this brief.

Judge Swan said about Costello, p. 662:

> "* * * but he still was under the necessity of showing some reasonable basis for his fear of self incrimination by answering the questions propounded. Judge Clancy rightly held there was no such basis."

53 Your Honor will note that Judge Swan held that any conspiracy to obtain citizenship had terminated and that, p. 662:

> "* * * the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred, was too remote to support a bona fide need for the assertion of the privilege."

We expect to point out here some of our reasons for requesting Your Honor to hold that the danger to DeLucia was clear and present, not remote.*

First we ask Your Honor to examine the indictment in No. 57 CR-154 to see how the Government seeks to avoid the statute of limitations. Although the statute has run against taxes for 1948 and 1949 the indictment makes use of a recent date upon which it is alleged that DeLucia made false statements. The conspiracy count shows on its face that the statute had run except for the allegation that the

* Upon reconsideration we trust that Your Honor will see that the *Lustig* and *Jerome* cases are not in point. There the defendants were premature with their claim of self incrimination.

conspiracy was a continuing one. If Costello had pointed out the possibility of such tactics to the trial judge in his case, the result may have been different. In the case at bar, DeLucia has every reason to believe that the statute of limitations would not prevent a number of indictments.

Suppose we consider just one series of questions put by Mr. Bickley. Questions were asked (Nos. 89, 90, 91, 92, 93, 99, 100 and 101)* intended to establish the DeLucia was convicted in New York, paroled and then questioned before various Congressional Committees.†

54 Then Your Honor will find these questions put by Mr. Bickley which we have numbered:

"100. Q. And did you testify before the Special Committee to investigate organized crime in interstate commerce of the United States Senate at Chicago, Illinois, on October 6, 1950?

101. Q. Mr. DeLucia, some of the matters that I have asked you here today, you have previously testified about under oath.

Do you wish to change your answers to any of the questions which I have asked you today?"

The statute of limitations has run if DeLucia is to be charged with perjury before these Committees. Also the statute gives him immunity, his testimony is not to be used in other cases. But if DeLucia had not refused to answer he would have opened the door to another prosecution. If he had said that his former testimony is true that could have been used as a basis for another charge that he made a false representation on the day of the deposition. If he had said that his Congressional testimony was false that could be used in No. 57 CR 154 as an admission that the continuous conspiracy was in operation back in 1950 as charged.

† The background and history can better be understood after Your Honor considers the affidavit of Attorney Joseph Bulger submitted herewith. Your Honor is authorized to take judicial notice of much of this background material, records, Congressional hearing reports, etc. as they were introduced before Judge Igoe in the parole warrant cases.

We respectfully invite Your Honor to consider another series of questions:

> "54. Q. Did you execute a depositor's card on September 8, 1927, with the First National Bank of Chicago?
>
> 55. Q. Were you, at that time, residing at 917 Blue Island Avenue, Chicago, Illinois?
>
> 56. Q. Have you ever resided at 917 Blue Island Avenue? • • •
>
> 58. Q. Did you claim at the time of the execution of the depositor's card that you were, at that time, a theater manager?
>
> 59. Q. Have you ever been a theater manager?
>
> 60. Q. Did you ever manage the Dante Theater here in Chicago?"

If these questions stood alone and Your Honor did not know anything of DeLucia's background they would seem harmless enough. Your Honor might wonder what they had to do with the naturalization suit, but Your Honor could not be blamed if an order were entered to require DeLucia to answer such innocent looking questions. But are they innocent? Your Honor will know better than to regard them as harmless when background is considered. It will be seen from the record made in *United States* v. *Campagna*, 146 F. 2d, 524 that DeLucia was charged with a continuous conspiracy having for its object, extortion from theater owners and operators. A charge made in a separate indictment that DeLucia and others conspired continuously to take money from the union involved with theaters was pending and dismissed. The likelihood that such charges will be made again is not remote at all. Proof of the management of the Dante Theater may be a missing link. The Government may have sufficient facts to indict, all but this one fact. If the Government is in possession of other evidence that DeLucia managed the theater and lived at 917 Blue Island Avenue, why ask DeLucia? The

fact does not appear to be material to the case at bar, so it must be material to some other charge. At least DeLucia has a right to such a fear.

Next we ask Your Honor to consider the following:

> "62. Q. Did you ever execute an application for beneficial membership in the Italo-American National Union for insurance?"

That question standing alone appears harmless but if Your Honor will look at the reports of the Congressional Committees it will be seen from the questions asked, that
56 instead of being an insurance company this in fact was said to be part of the Mafia, a blackhand society alleged to have been operated by DeLucia and his Italian friends.

After Mr. Bickley asked about criminal trials said by him to have occurred in Italy we find the following:

> "47. Q. Referring to the second conviction, that I talked about before, that was entered in absentia, have you taken any steps in recent years to set aside that conviction or lift the warrant of arrest that was outstanding?"

If DeLucia answered and said he had done something here, chances are that that could be made a basis for some sort of conspiracy to corrupt the United States officials or to make false representations to them. In this connection please consider the following:

> "107. Q. Was your sister Emilia and your father, Antonio, ever indicted for, or brought to trial on a charge of voluntary homicide on the person of Raphael Perillo?"

This question on its face indicates that DeLucia was being questioned about other crimes committed by others. Surely DeLucia had a right to fear that an effort was being made to connect him with some criminal activity here concerning such crimes. Next please consider the following:

"85. Q. Now, Mr. DeLucia, you registered for the draft on February 16, 1942; is that not correct?

86. Q. Did you register for the draft?"

It is common knowledge that many federal crimes arise out of registration for the draft. It would be difficult for DeLucia to comprehend what registration had to do with the effort of the Government to take away his citizenship. Naturally he would fear further prosecution based upon draft laws. DeLucia also would wonder why the prose-
57 cutor wished to know if he had lived at this address and that address if the prosecutor was not seeking evidence concerning the commission of some other crime.

In the absence of the background material furnished the Court, Your Honor might have concluded that DeLucia could have answered some of the questions about his naturalization. But Your Honor is requested to keep in mind the danger of having the Government officials claim that any answer would constitute a waiver. There exists still another danger because of the nature of this case. Your Honor knows that in this proceeding the Government has attempted to charge DeLucia with fraud in the procurement of his citizenship. It can not be said here that that fraud if committed was committed so long ago that DeLucia need have no fear because it happened so long ago. From the newspaper articles and the questions asked DeLucia and various witnesses, the Government is seeking evidence upon which to charge DeLucia with a large number of crimes including the importation of narcotics, smuggling, violation of liquor laws, offenses against the currency and interstate commerce. It would be a simple matter for the Government to allege that his claimed illegal entry was part of a continuing conspiracy to come to this country for the purpose of violating our laws. That part of the plan of the conspirators was not only to obtain citizenship papers but to continue to conceal the alleged fraud, in

order for DeLucia to maintain that status and not be subject to deportation. As Your Honor knows, if the Government is able to cancel citizenship in the case at bar, the law will regard DeLucia as an alien, as if he never had citizenship. The Attorney General has announced his intention to deport DeLucia if possible. DeLucia has one felony conviction and is under indictment for another. It is obvious that the prosecution is seeking to have DeLucia incriminate himself in order to pave the way for future prosecutions.

58 Upon reconsideration, we trust that Your Honor will perceive that DeLucia faced a real danger and could not have answered the questions without furnishing evidence against himself for use in contemplated criminal prosecutions.

Since the preparation of this answer and brief, we have been informed that the Government seeks some order under Rule 37. Rule 37 provides for certain remedies where the refusal was without substantial justification. We respectfully submit this answer brief and material in support of our contention that defendant was justified in his refusal to answer.

Upon oral argument Wednesday, April 3, 1957, as we understood it, Mr. Bickley asked Your Honor to reconsider the rulings heretofore made concerning the requests for admissions. Mr. Bickley cited *Ackerman* v. *United States*, 340 U. S. 193 and *United States* v. *Eichenlaub*, 180 F. (2d) 314 in support of his argument that *Klapport* v. *United States*, 335, 601 cited by Your Honor has been modified. We do not find any modification of the rule of law announced by Your Honor. Mr. Bickley has stated that he does not seek a default judgment and we are not in Court seeking relief under Rule 60(b). So with all due respect we are unable to find anything of value here in *Ackerman* or *Eichenlaub*.

Your Honor will remember that at the same oral argument we requested reconsideration of the order to answer in three days. We cited *People* v. *Newmark*, 312 Ill. 625, and *People* v. *Boyle*, 312 Ill. 586 (which cited federal cases) from which it will be seen that the present order of court to answer all of the questions cannot support any contempt judgment if Your Honor is now able to perceive that DeLucia was within his rights in refusing as to some questions asked.

59 We respectfully submit that the papers filed by the Government will not support any rule to show cause as a matter of procedure. We have appended hereto a copy of the notice and petition filed by the Government. Your Honor will observe that there is no affidavit, the petition is not sworn to and Your Honor will not be able to find a charge of contempt. The petition states that it is within the power of this court to do certain things and then prays for relief under Rule 37(b)(2)(i) of the Federal Rules of Civil Procedure.

We trust that upon study of the matter Your Honor will hold that DeLucia was within his rights and therefore not in contempt.

Respectfully submitted,
Wm. Scott Stewart,
Attorney for Defendant.

60 Appendix.

Memorandum.

The government has submitted three motions for determination in the above cause.

The first is a motion to strike the answer of the defendant and to order defendant to answer those portions of the complaint he knows to be true and which in his answer he admits are correctly stated. Defendant has filed a general

denial and appended to said answer a Note of Explanation wherein he expressly admits some of the matters are correctly stated in the complaint, but that no answer can or should be made since to do so would waive his later assertion of the privilege of the Fifth Amendment. It is axiomatic that waiver of the privilege of the Fifth Amendment at any stage of the proceedings in which it might have been claimed precludes its subsequent assertion and such a waiver may occur by the filing of an answer. Although the answer is not in the approved form of the Federal Rules of Civil Procedure, the court is of the opinion the government's motion to strike the same should be overruled.

The second motion is to compel the defendant to answer oral interrogatories posed at his deposition and which he refused to answer on the ground that he did not want to be a witness against himself and declared the privilege of the Fifth Amendment. The court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States* v. *Costello*, (D.C. N.Y., 1954) 16 F.R.D. 428, aff'd (C.A. 2, 1955) 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig*, (D.C.N.Y., 1954) 16 F.R.D. 138; *United States* v. *Jerome*, (D.C.N.Y., 1954) 16 F.R.D. 137.

61 The third motion requests that if the court deem it necessary that an order be entered compelling defendant to answer certain requests for admissions served upon the defendant by the government. The defendant has failed to answer these within the time provided by Rule 36. These requests for the most part seek the same information as the oral interrogatories. No provision can be found either in Rule 36 or in the other procedural rules which would authorize this court to compel a defendant to answer a

request for admissions. *United States* v. *Schine Chain Theatres*, (D.C.N.Y. 1944.) 4 F.R.D. 109, Ill.; *Momand* v. *Paramount Pictures Distributing Co.*, (D.C. Mass., 1941) 36 F. Supp. 568, 573.

An order has this day been entered overruling the government's motion to strike the defendant's answer and its motion to compel answer to the requests for admissions. It is further ordered that the defendant answer the oral interrogatories posed at his deposition within three days from date hereof.

S/ Walter J. LaBuy
Judge, United States District Court

March 27, 1957

62 Supplemental Memorandum.

The court deems it advisable to supplement its previous memorandum which failed to indicate the court's opinion with reference to the default of the defendant to answer the government's Request for Admissions.

Rule 36 of the Federal Rules of Civil Procedure provides that

> "* * * Each of the matters of which an admission is requested shall be deemed admitted . . ."

unless the party upon whom the requests are served (1) files a denial, (2) sets forth why he cannot truthfully admit or deny, or (3) makes a written objection to the requests. Having failed seasonably to answer or object, the defendant in this suit, according to the government, must be held to have admitted the matters requested.

It is apparent that the government considers this case to be an ordinary civil suit. However, the court must recognize the admonition of the Supreme Court of the United States, often repeated, that denaturalization suits

are not ordinary civil law suits. In *Klapprott* v. *United States*, (1949) 335 U. S. 601, 611-612, the Court declared:

"Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof. Even decrees for divorce or default judgments for money damages where there is any uncertainty as to the amount must ordinarily be supported by *actual proof*. The reasons for requirement of proof in cases involving money apply with much greater force to cases which involve forfeiture of citizenship and subsequent deportation. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe
63 penalty. The consequences of such a deprivation may even rest heavily upon his children. * * * As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living.' NgFung Ho v. White, 259 U. S. 276, 284. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof, while requiring proof to support a mere money fine or a short imprisonment.

"Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. Schneiderman v. United States, 320 U. S. 118, 158. *This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt.* * * * Assuming that no additional procedural safeguards are required, it is our opinion that courts should not in §738 proceedings deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance."

And, Justice Rutledge, in his concurring opinion, stated, at page 616:

> "To treat a denaturalization proceeding, *whether procedurally or otherwise*, as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.
>
> * * *
>
> ". . . the Schneiderman decision and Baumgartner v. United States, 322 U. S. 665, required *a burden of*
> 64 *proof for denaturalization* which in effect *approximate the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization. This was in itself and to that extent recognition that ordinary civil procedures such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences.* * * *"

These emphatic declarations of the Supreme Court of the United States, impel this court to the conclusion that any default, including technical and procedural defaults which in ordinary civil cases result in evidentiary admissions, cannot be utilized to mitigate, lessen or relieve the government of the positive and affirmative burden imposed by the Supreme Court to prove its case "beyond a reasonable doubt."

S/ Walter J. LaBuy
Judge, United States District Court

March 29, 1957

65 UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

Notice.

To: William Scott Stewart, Esquire
Attorney At Law
77 W. Washington Street
Chicago 2, Illinois

Please take notice that on Wednesday, April 3, 1957, at the opening of court or as soon thereafter as counsel may be heard, I shall appear before his Honor, Judge Walter J. LaBuy, in the courtroom usually occupied by him the United States Court House, 219 South Clark Street, Chicago 4, Illinois, or before such other Judge who may be sitting in his place and stead, and then and there present a Petition, a copy of which is attached hereto, at which time and place you may appear if you so see fit.

R. Tieken,
United States Attorney

Received a copy of the above and foregoing Notice together with copy of Petition this 2 day of April, A. D. 1957.

William Scott Stewart,
Attorney for Defendant

66 UNITED STATES DISTRICT COURT.
* * (Caption—56-C-1676) * *

Petition.

Your Petitioner, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, respectfully represents unto the court as follows:

1. That on March 27, 1957, this Honorable Court filed a Memorandum in the above entitled case which contained therein an order on the defendant, Paul DeLucia also known as Felice De Lucia, to answer oral interrogatories posed at the taking of his deposition on February 20, 1957, within three days from the date thereof.

2. That in order for the defendant to comply with the court's order, the defendant would of necessity have to appear either before an official court reporter and answer the questions or file with the Clerk of this Honorable Court answers to the questions posed at the deposition on or before 5:30 P.M., April 1, 1957.

3. That on March 28, 1957, Assistant United States Attorney John H. Bickley, Jr., called the office of counsel for the defense, Mr. William Scott Stewart, and asked Mr. Stewart when he intended to bring the defendant in and answer the questions and thus comply with the court order. Mr. Stewart advised him that he was not sure from reading the court order as to whether or not he had to produce the defendant to answer the questions, or whether he could merely file answers thereto with the Clerk of this Honorable Court, but in any event stated: "I have told the
67 Judge what our position is in this matter, we do not intend to answer these questions, I am not going to bring the defendant in, nor file any answers thereto, and it appears that the next move is up to you".

4. That up to and including the present date, the defend-

ant has failed to answer the questions posed at the deposition, has failed to file with the Clerk of this Honorable Court answers to the questions posed at the deposition and has wilfully refused to comply with the order of this court entered March 27, 1957 in any manner.

5. That it is within the power of this court, in addition to holding this defendant in both criminal and civil contempt because of his wilful refusal to comply with the court's order, to enter an order pursuant to the provisions of Rule 37 (b) (2) (i), to the effect that the matters regarding which the questions were asked and the facts sought thereby shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

6. That because of the wilful refusal of the defendant, the United States of America is entitled to the entry of such an order and wishes to inform this Honorable Court that it will be ready for trial on April 8, 1957.

Wherefore, the Petitioner, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, prays this Honorable Court to enter an order pursuant to the provisions of Rule 37 (b) (2) (i) of the Federal Rules of Civil Procedure, ordering that the matters regarding which the questions were asked of this defendant on his deposition or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the Petitioner now seeking the order.

Respectfully submitted,

R. Tieken,

United States Attorney.

68 UNITED STATES DISTRICT COURT.

(Caption—56-C-1676)

CONTEMPT ORDER.

This cause coming on this date to be heard upon the verified answer of the defendant, Paul De Lucia, filed this date with the Clerk of this Court, to the Rule to Show Cause, allowed on June 7, 1957, by the court in its Memorandum Opinion and it appearing to the Court that since the order was made herein on March 27, 1957, the defendant Paul De Lucia, has wilfully failed to comply with this Court's order in any manner, and the Court having heard arguments of the respective counsel, and having considered the briefs and documents filed of record and the Court being fully advised in the premises,

It Is Hereby Ordered and Decreed that the defendant, Paul De Lucia, be and is hereby adjudged guilty of contempt of this court in violating the order made on the 27th day of March, 1957, in the case of *United States of America v. Paul De Lucia*, No. 56 C 1676, pending in this court.

It Is Further Ordered that the defendant Paul De Lucia, be assessed and fined the sum of Five-Hundred Dol-
69 lars ($500.00) for having violated the order heretofore issued in the case hereinabove referred to and that the same be paid into the registry of this court.

It Is Further Ordered that payment of this fine is hereby stayed pending appeal or until such time as a final order be entered, under usual appellate procedure, with reference to the above.

Enter:

Walter J. La Buy,

Judge.

Dated at Chicago, Illinois, this 11th day of June, A.D. 1957.

JHBjr:ge

70 UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff,* vs. Paul De Lucia, *Defendant.*	Honorable Walter J. LaBuy, District Judge.

NOTICE OF APPEAL.

(Filed Jun. 11, 1957. Roy H. Johnson, Clerk.)

Notice is hereby given that Paul DeLucia the defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment entered in this action on June 11, 1957.

Respectfully submitted,

Wm. Scott Stewart,
Attorney for Appellant
Paul DeLucia.

71 United States of America,
Northern District of Illinois, } ss:

(Caption—56-C-1676)

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 11th day of June, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, United States Attorney,
450 United States Court House,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 11th day of June, 1957.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

72 IN THE UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

STIPULATION.

(Filed Jun. 19, 1957. Roy H. Johnson, Clerk.)

It is hereby stipulated by and between the attorneys for the plaintiff and the attorney for the defendant, pursuant to Rule 12 (e) of the United States Court of Appeals, for the Seventh Circuit, that the Clerk of this District shall include among the original papers to be transmitted to said Court of Appeals the items below listed and shall omit others:

1. The oral *motion for rule* to show cause made February 28, 1957. Together with notice, affidavit and motion. Requests for admissions.
2. The answer and brief in opposition filed same day.
3. Motion for rule to show cause filed April 8, 1957.
4. Rule to show cause entered April 8, 1957.
5. Order allowing rule to show cause.
6. Sworn answer of Defendant filed June 11, 1957.
7. Judgment or order finding defendant guilty of contempt.
8. All briefs filed relative to contempt action.

R. Tieken,
United States Attorney.
JMB

Wm. Scott Stewart,
Attorney for Defendant.

73 IN THE UNITED STATES DISTRICT COURT.
(Caption—56-C-1676)

ORDER EXTENDING TIME FOR RECORD.

For good cause shown, the time for filing the record on appeal in the above entitled cause is hereby extended to and including August 12, 1957.

Enter

Campbell,
Judge.

A True Copy Teste

Roy H. Johnson,
(Seal) *Clerk,*
By Gizella Butcher,
Deputy Clerk.

July 26, 1957.

74 United States of America, }
Northern District of Illinois, } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the contempt proceedings in the cause entitled: United States of America, Plaintiff, *vs.* Paul DeLucia, also known as Felice De Lucia, Defendant, No. 56 C 1676, as follows:

Notice, Motion to compel party to answer oral interrogatories on deposition and affidavit in support of motion filed February 28, 1957.

Motion of plaintiff filed April 8, 1957 and Affidavit of John H. Bickley, Jr., Assistant United States Attorney.

Order entered April 8, 1957 ruling on plaintiff's motion

for rule to show cause deferred until the trial of this cause.

Order entered April 8, 1957 denying defendant's motion for reconsideration of Court's ruling with respect to order requiring defendant to answer oral interrogatories; denying motion of plaintiff for order under Rule 37(b) (2) (i), FRCP.*

Answer of Defendant filed June 11, 1957.

Contempt order entered June 11, 1957.

Defendant's Notice of Appeal filed June 11, 1957.

75 Stipulation re the contents of record on appeal filed June 19, 1957.

Order entered July 19, 1957 extending time for filing record on appeal to and including August 12, 1957 (certified copy of original incorporated in transcript of record on appeal in complete record).

filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of July, 1957.

Roy. H. Johnson,

(Seal) *Clerk.*

By Gizella Butcher,

Deputy Clerk.

* Order entered June 7, 1957 plaintiff's motion for rule to show cause allowed and defendant to answer within ten days.

Office - Supreme Court, U.S.
FILED
AUG 5 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 264

PAUL DeLUCIA

VS.

UNITED STATES of AMERICA

PETITION

FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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APPENDED

Opinion of United States Court of Appeals in this and a related contempt case.

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PETITIÓN

FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States—

May it please the Court:

The petition of Paul De Lucia respectfully shows to this Honorable Court:

I.

The Opinions of the Courts Below.

The unreported opinion of the District Court is shown in the record. (Vol. I, p. 325) The opinion of the Court of Appeals in *United States* v. *De Lucia*, rendered June 18, 1957, has not been reported to date. It is shown in the record. A copy has been appended together with a copy of an opinion in a related contempt case herein pp. 75 to 88.

II.

Jurisdiction.

The date of the judgment to be reviewed is June 18, 1957. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254) Based on Title 28 S.C. 1940 ed §§ 346 and 347 (Mar. 3, 1911, c. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, c. 229 § 1, 43 Stat. 938; Jan. 1, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926) (from Revisors Note Title 28 U.S.C.A. Judiciary and Judicial Procedure § 1254 p. 42).

III.

Questions Presented

1. Does the abuse of the Federal Rules of Civil Procedure concerning pretrial practice carried on with the approval of the courts below, call for supervision and correction in this Honorable Court. Does the case at bar raise important questions as to the proper application of the Federal Rules of Civil Procedure?

The record in this case reveals the following procedure. The question submitted is not only one of due process. Does the procedure accord with fairness? Does the pro-

cedure approved below call for supervision by this Honorable Court?

(a) The United States Attorney filed a complaint, supported by an affidavit. The affidavit gave an outward appearance of compliance with the requirement of Congress that these suits require certain preliminary safeguards. The hearing before the District Court revealed that the slightest inquiry would have demonstrated that the allegations to be found in the affidavit were unfounded. Affiant swore to matters known by him to be false, or, on the other hand, swore to them in utter disregard of the truth. The very foundation of the complaint as to matters jurisdictional were abandoned at the trial, *i.e.*, (1) no certificate of arrival, (2) no attachment.

The evidence produced at the trial shows that the affidavit and complaint were spurious, intended merely to set in motion Federal Civil Procedural Rules, in order to make use of pretrial proceedings. The whole scheme was designed to require petitioner to not only supply evidence from his own mouth to denaturalize him, but to aid the Government in another prosecution pending.

(b) The District Court was fully informed concerning the position of petitioner. Petitioner was given the choice between helping the Government to prove out of his own mouth certain charges made in a pending indictment, or claiming privilege.

(c) After petitioner claimed privilege and the District Court was informed of the claim and apprised of the background and reasons for the claim, the District Court ordered petitioner to answer over 100 questions. Many of these questions show on their face that they were designed to help the Government prove charges made in a pending indictment.

(d) Because of the insistence of petitioner that he was protected by the Fifth Amendment he was punished, not only by the imposition of a fine, but the courts below threw into the scale the refusal to answer, by holding that the Government had proved its case. In other words, the District Court punished petitioner because of his claim of privilege, by holding that the Government had a case, where in fact the Government was unable to prove its case. All of this because petitioner had not come forth and explained away the charges against him. This was all done in the face of petitioner's early assertion that the Government had no case. The trial demonstrated that the Government was unable to prove its case. The trial also revealed that the Government officials knew they had no case and expected to rely upon the Federal Rules of Civil Procedure to force petitioner to prove the case for them.*

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* In other words, we submit that the record discloses that the Government officials acted with bad faith. We direct the attention of Your Honors to **United States v. Zucca**, 351 U.S. 91; **United States v. Nowak**, ... U.S. ....., as support for our contention that the United States Attorney, in this and in various jurisdictions has manifested no regard for the rights of a naturalized citizen. The Government Officials resist every application of the spirit of the requirement of a proper affidavit. When we make the charge that the affidavit and complaint in the case at bar were in fact spurious, we fully realize that such charges should not be made without support in the record. We trust that our argument will point to the record sufficiently and that Your Honors will perceive the abuse practiced under the guise of compliance with prescribed rules. The Petition for Naturalization (Vol. I, p. 322; Vol. II, Exhibit No. 1, p. 1) shows a certificate of arrival. We fail to understand how anyone could possibly swear truthfully that he had looked at the files and found no certificate of arrival, unless he was careless. The real solution, we submit is that the officials merely go through a form designed to survive preliminary motions in order that the United States Attorney might invoke the Federal Rules of Civil Procedure.

(c) The reprisal in the case at bar amounts to a finding by the courts below that the Government had produced sufficient evidence when in fact it had not. The fact of the refusal of petitioner to testify was accepted as proof of a case, where otherwise no case existed.

2. When the Court of Appeals reversed the contempt sentence, did it not err in failing to consider further the effect of the error of the District Court in holding that petitioner had no right to the protection of the Fifth Amendment?

3. Can the Government proceed against a naturalized citizen with a design to revoke his certificate, without evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals?

4. What Congress meant by certain statutes and whether the Government has proved its case under them? The statute having been changed since this question was submitted under the previous law, the question now submitted is, what Congress means by the shift?

5. If thirty years after a federal court adjudged him entitled to be a citizen that judgment can be nullified and petitioner can be stripped of this most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established?

6. When petitioner properly invoked the Fifth Amendment and refused to answer questions, did not the lower courts err in throwing this refusal into the scales against petitioner at his trial?

7. May the Court of Appeals disregard the findings of fact made below, try the case *de novo* and make findings of fact, not supported by evidence?

8. When it appears that the Court of Appeals regarded itself bound by the findings of the District Court in disregard of the rules promulgated by this Honorable Court, should not this Court invoke its supervisory powers?

9. When it appears that the District Court, with the approval of the Court of Appeals, has rendered a decree of denaturalization without adequate findings; when it appears that the District Court, with the approval of the Court of Appeals, has supported its decree with haphazard findings of fraud not proved and not properly pleaded; when it appears that the courts below have failed to distinguish between illegal procurement and fraud, and have failed to notice the change in legislation, should not this Honorable Court reverse and remand for the purpose of making adequate findings? Will this Honorable Court take a broader view in order to settle important questions pertaining to the status of all naturalized citizens?

10. Does not this case raise important issues in the proper administration of the law affecting naturalized citizens. Important issues are raised, which have not been, but should be settled by this Honorable Court. Some of these issues have been decided by the Court of Appeals in a way to conflict with applicable decisions of this Court. Has not the Court of Appeals so far departed from the usual course of judicial proceedings and sanctioned such departure on the part of the District Court, as to call for the power of supervision vested in this Court?

11. There was no evidence to show lack of jurisdiction on the part of the Naturalization Court. No evidence to show the kind of fraud which traditionaly vitiates judgments. So the question arises and is presented in this case,

can Congress constitutionally attach to the exercise of the judicial power, under Article III of the Constitution, authority in the District Court to re-examine a judgment of citizenship, after the judgment has become final by exhaustion of the appellate process or by failure to invoke it?*

12. Since 1790 Congress has conferred the function of admitting aliens to citizenship exclusively upon the courts. In exercising their authority under this mandate the federal courts are exercising the judicial power of the United States, conferred upon them by Article III of the Constitution. *Tutun* v. *United States*, 270 U.S. 568. For this reason it has been suggested (In *Schneiderman* v. *U.S.*, 320 U.S. 118, 124) that a decree of naturalization, even though the United States does not appear, cannot be compared (as was done in *Johannessen* v. *United States*, 225 U.S. 227, 238) to an administrative grant of letters patent for invention, and that the permissible area of re-examination is different in the two situations.**

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* This question was raised but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124: In the case at bar the evidence shows that the Government was represented at the hearing conducted by the Naturalization Court and that this representative consented to the award of citizenship. So in the case at bar, the Government now seeks to revoke a previous consent decree.

** This question was raised but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124. The case at bar again presents this question, which should be answered, if here reached, for the guidance of the federal courts exercising the judicial power of the United States. The question here presented includes a case wherein the Government is shown to have been represented at the hearing in the Naturalization Court. The evidence shows that the Government consented to the order admitting petitioner to citizenship.

13. The case at bar presents the question whether under the Act of 1952, in the absence of a proper claim of fraud, relying wholly upon a charge of illegal procurement, can the Government secure a *de novo* re-examination of the finding and judgment made by the Naturalization Court which Naturalization Court upon consideration of the petition, affidavits in support thereof and further testimony taken in open court, decided that petitioner was entitled to be admitted to citizenship, the Naturalization Court having found that petitioner had in all ways complied with the Naturalization laws.*

14. Should not the District Court, when requested, have determined whether the revocation was based upon a finding of illegal procurement or fraud, or both? If based upon illegal procurement, the District Court should have held that the Act of Congress in 1952 has taken jurisdiction on the ground of illegal procurement from the courts. If based on fraud, should not the District Court have found that the complaint failed to give support to such charge? Should not the District Court have found further that there was no evidence of the kind of fraud which traditionally vitiates judgments? The Court of Appeals was duly requested to clarify and answer these questions. The Court of Appeals having refused, should not this Honorable Court exercise its power of supervision, in order to put a halt to such a departure from the accepted and usual course of judicial proceedings?

15. Did not the Court of Appeals for the Seventh Circuit in the case at bar render a decision in conflict with a decision in *United States* v. *Stromberg*, 227 F. 2d 903, in

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*This question was raised under a previous Act but not reached in **Schneiderman vs. United States**, 320 U.S. 118, 124. The change in the statute makes it even more important that Your Honors clarify the problems of construction.

the Fifth Circuit on the matter of illegal procurement? The *Stromberg case* holds that illegal procurement is not a ground for denaturalization under §340(a) of the Immigration and Naturalization Act of 1952. The courts below in the case at bar appear to have endeavored to support the decree on the ground of illegal procurement. It is difficult to ascertain from the record made at the trial and the opinion rendered by the Court of Appeals, whether or not the courts below distinguished between fraud and illegal procurement. Should not this Honorable Court exercise its supervisory power, by requiring the courts below to be more specific, to consult *Minerich*, 250 F. 2d, 721 and to render a decision in conformity with the decisions of this Honorable Court?

16. Has not the Court of Appeals for the Seventh Circuit in the case at bar rendered a decision in conflict with the Court of Appeals for the First Circuit on the same matter in *Cufari* v. *U. S.*, 217 F. 2d 404. The District Judge in the case at bar said, (Vol. I, p. 335):

> "Stephen Dursich and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul De Lucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizinship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

In the absence of any testimony as to what may have taken place before the Designated Examiner, MacKay, the District Judge looked to the testimony of the Examiners, who

were not present in order to guess what may have happened. In *Cufari* after stating that the Government offered to prove custom, which offer was rejected, Judge Woodbury said, p. 406:

> "The District Court rejected this offer of proof on two grounds. It said it was of the opinion that the evidence offered was legally insufficient to establish the Government's case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt, and furthermore, that it would not find such evidence persuasive even though it were legally admissible."

We copy the footnote, p. 407:

> "Although we do not question the probative value in some situations of evidence of a person's habitual or customary conduct as showing the conduct of that person on a particular occasion (see 1 Wigmore on Evidence (3rd Ed. 1940) §§92, 93) we agree with the District Court's ruling excluding such evidence in the situation presented in this case. We therefore reject the Government's suggestion that in the event of our disagreement with the District Court's conclusion we should remand the case for a new trial in order that evidence of the custom and practice of the Examiners involved might be considered."

In the case at bar, the Court of Appeals refused to reject findings of the District Judge based upon proof of custom. This conflict in decisions, if permitted to stand will no doubt create confusion. In many pending cases the question no doubt will arise in the future.

After an order granting citizenship has been on the books for about 30 years, it is to be expected that the examiners may have passed on, or those surviving may not remember a particular applicant. In the case at bar, this Honorable Court is requested to decide if proof of custom should be permitted to take the place of evidence.

17. Has not the Court of Appeals for the Seventh Circuit, in the case at bar, rendered a decision in conflict with a decision on *res judicata* rendered by the District Court in *United States* v. *Kusche*, 56 F. Supp. 201.*

18. Does not the case at bar present an important question of procedure in denaturalization cases? Is it proper under the Federal Rules of Civil procedure to subject a defendant to the usual pre trial proceedings, to the end that if the defendant claims the protection of the Fifth Amendment, such claim shall be used against the defendant in the trial of the case, to such extent that the silence of the defendant may be held to take the place of evidence? In other words, can the Government prevail in a case where it has been unable to establish its case, by reliance upon the failure of the defendant to testify or produce evidence?

19. The case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to thousands of naturalized citizens. The question posed is:

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate, with-

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* In a well reasoned opinion, Judge Hall demonstrates that to rely upon **Johannessen v. United States**, 225 U.S. 227, as did the Court of Appeals in the case at bar, is to decide a federal question in a way to conflict with the applicable decisions of this Honorable Court. We quote from Judge Hall, p. 223:

> "The **Schwinn case** (311 U.S. 616) destroyed whatever authority, if any, the **Johannessen** 1912, 225 U.S. 227 and **Mansour** cases 70 F. 671 were to the contrary."

We refer Your Honors to the opinion of Judge Hall, in order to properly appraise the authorities cited in the case at bar and in order to distinguish them, as not supporting the holding made in the Seventh Circuit.

out evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals!

IV.

Statute Involved.

Section 340(a) *of the Immigration and Naturalization Act of* 1952 (66 *Stat.* 260), 8 *U.S.C.* § 1451(a).

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *

V.

Summary Statement of the Matter Involved.

This is a denaturalization proceeding brought under Section 340 (a) of the Immigration and Nationality Act of 1952, 66 Stats. 163, 8 U.S.C.A. 1451. The District Court, after a hearing, entered a decree of denaturalization (Vol. I, p. 338). The entire trial court record was printed for use of the Court of Appeals, entitled Appendix Volume I.

All of the exhibits, consisting of papers, records and documents, were photostated and ordered up to the Court of Appeals. They have been sent here. All exhibits to be considered were printed, pursuant to the rules of the Court of Appeals, in Appendix Volume II. A narrative statement of the evidence was also furnished to the Court of Appeals (Vol. I, p. 343). It is important to note at the outset that the entire proceedings are to be submitted here because of the claim of petitioner that the Government has no case. The Government was proven to have been unable to support the decree.

Petitioner, Paul De Lucia, in 1928 was admitted to citizenship. It is important to observe the details of the record made in 1928, when DeLucia was adjudged a citizen, because of the defense made based upon estoppel and *res judicata*. The Naturalization Court order recites (Vol. II, p. 2) that the judgment was based upon a petition, affidavits in support and further testimony taken in open court. The certificate (Vol. II, p. 9; Vol. I, p. 324) recites that the Naturalization Court found that De Lucia had, in all respects, complied with the Naturalization Laws. Petitioner followed the requirements and prohibitions as to procedure. This compliance appears from the face of the record. (Vol. I, pp. 315-325; Vol. II, pp. 1-10) No evidence was introduced in the case at bar to suggest that De Lucia had not followed the requirements and prohibitions as to procedure or that the papers were not regular. Petitioner, as is shown by the record made at the time of naturalization, proved by the testimony of two witnesses, who in turn had the required qualifications, that these witnesses had in fact known the petitioner for the requisite probationary period. These two witnesses proved, according to the record made at the time, that petitioner possessed good moral character and was attached to the prin-

ciples of the Constitution., Compliance with the statute is shown as to the manner and time of proceeding. No question was raised in the evidence at this denaturalization hearing to indicate any claim that those things depending upon petitioner's assertions at the time of his naturalization were untrue. No fraud was shown, such as vitiates judgments. It was contended in the courts below and is again asserted here that the judgment of the Naturalization Court was a barrier to a mere re-examination upon the merits of the very facts the judgment established. If the decree is to find any basis in the evidence produced in the case at bar, it must consist of evidence *de hors* the record made in 1928.

Petitioner moved for Summary Judgment, which motion was also regarded as a motion to dismiss. (Vol. I, p. 11) The main foundation for the motion was that petitioner stood upon the validity of the judgment of the Naturalization Court. This motion was overruled. (Vol. I, p. 14) The defendant filed his answer (Vol. I, p 15) denying the allegations of the complaint. To this answer petitioner attached a note of explanation, to the effect that he declined to be a witness against himself. It is important to note procedure prior to trial. It is contended that abuse of the Federal Rules of Civil Procedure amounted to denial of due process. The Government made use of various motions preliminary to the trial.

(a) Motion to strike the answer.

(b) Motion to require petitioner to make certain admissions.

(c) Motion to require answers to questions put orally to petitioner before a Notary Public.

The District Judge filed a memorandum (Vol. I, p. 47) disposing of these motions. The motion (a) to strike and (b) that for admissions was ruled against the Government.

Petitioner was ordered to answer the questions (c) put to him before the Notary. The District Court refused to allow the privilege claimed under the Fifth Amendment. This ruling was held to have been in error by the Court of Appeals. (herein p. 85). Petitioner in his answer, with brief in support, to the motion of the Government, to have him committed for contempt explained his reasons for asserting his privilege. (Appendix to contempt proceedings, p. 21) When the Government moved to have petitioner punished for contempt, because of this refusal (c) the District Court postponed decision until after the trial.

Evidence was introduced by the Government intended to establish grounds for revocation. At the conclusion of this evidence petitioner rested. Petitioner elected to demurrer to the evidence produced by the Government.

A decree of Denaturalization was entered (Vol. I, p. 338). The District Judge filed a Memorandum (Vol. I, p. 325) designated as findings of fact and conclusions of law. The Decree entered by the District Court has been affirmed by the Court of Appeals, opinion appended hereto, p. 75.

After the disposition of the main case, the District Court adjudged petitioner in contempt of court. The contempt sentence was appealed. The Court of Appeals reversed. We have brought here the record made for the Court of Appeals in the contempt case. The record in the contempt case having been printed for use of the Court of Appeals we submit the printed copies herewith in an effort to acquaint Your Honors with the questions involved and here submitted. We append the opinion of the Court of Appeals in the contempt case, herein, p. 85. It will be observed that in his effort to have Judge LaBuy recognize the privilege, DeLucia filed an answer pointing out that DeLucia

was indicted in another federal case. (Appendix in Contempt case, p. 26). It was pointed out to Judge LaBuy that DeLucia had been asked over 100 questions and the manner in which the United States Attorney was endeavoring to use this pretrial proceeding in preparation of other prosecutions. With this background before Judge LaBuy, the District Court ordered DeLucia to answer all of the questions asked. DeLucia again asserted his privilege and was punished, not only by a fine, but the District Court went further and used the refusal to answer as if it were evidence against DeLucia.

An examination of the record in the case at bar will show that the Government filed a complaint alleging matters proved to be false at the trial, *i.e.*, the absence of a certificate of arrival and lack of attachment to the Constitution. (Vol. I, p. 5) These false statements, to be found also in the supporting affidavit (Vol. I, p. 8) gave the complaint the appearance of good cause. The complaint and affidavit were held to be sufficient to withstand the preliminary motions. (Vol. I, p. 14). During the trial these unfounded allegations were abandoned. The District Judge made no findings based upon these false charges. Nor did the District Judge find that these charges were unfounded. The findings of the District Judge rest largely upon general statements of fraud and as such are not supported by any proper allegations in the complaint.

The parties submitted briefs and argued the matter of *res judicata* and estoppel when the motion for summary judgment was presented. The District Court overruled the motion for summary judgment. (Vol. I, p. 14) The Government prevailed at this point, in part, because of the falsehoods in the complaint. These falsehoods pertained to jurisdictional matters, which if proved, might have supported a decree. The District Court in its mem-

orandum decision at the end of the case (Vol. I, p. 325) made no reference to the defense previously asserted based upon *res judicata* and estoppel. After hearing the evidence, the District Judge, by implication, overruled these defenses. The Court of Appeals specifically adjudged that the order of naturalization in 1928 was not *res judicata* of the issues presented in the denaturalization proceeding. (herein p. 81)

At the trial the Government undertook to prove that petitioner had been arrested and convicted of a felony in Italy, before his entry in this country. The proof failed completely. Although the Government introduced a large number of documents (Vol. II, pp. 12 to 43) intended to show that one Felice De Lucia had been so convicted, no effort was made to prove the law of Italy or the jurisdiction of the foreign courts. No evidence was produced to show that the Felice DeLucia named in these foreign documents was in fact petitioner. Judge LaBuy recognized this failure of proof and did not find that the Felice De Lucia named in the documents in fact was petitioner. Judge LaBuy did find as a fact that petitioner was Felice De Lucia. This conclusion was reached by circumstantially comparing the proven pedigree of petitioner in this country and comparing it with a parallel pedigree of one Felice De Lucia in Italy, *i.e.*, his birth certificate, his Italian family history. But Judge LaBuy did not attempt a further inference upon inference in order to conclude that the Felice De Lucia named in the so-called convictions was petitioner. The significance of the refusal of Judge LaBuy to take this step was ignored by the Court of Appeals.

The foundation of the Decree appears from the findings of the District Court to be the use of a name other than his own to enter this country. The District Judge recognized that it was necessary that the manner of entry should be

shown to have been material. So the District Judge followed the language of the complaint and held that concealments and misrepresentations concerning entry deceived the Examiners. It was found that these alleged concealments prevented full investigation and caused the Examiners to recommend citizenship. The complaint is based upon the claim that all of this amounted to a fraud upon the Naturalization Court (Vol I, p. 3). The District Judge found the existence of fraud in general terms. The claim made in the complaint was that the Naturalization Court relied upon the recommendation of the Examiner. The complaint alleged that the Naturalization Court was deceived because it too was prevented from looking into the previous history of petitioner, by reason of the recommendation made by the Examiner. There was a total failure of proof concerning the allegations and findings designed to make material the name used and previous convictions, if any.

Before the trial hearing was reached, Frank Meo, one of the original witnesses for petitioner had died. Michael Fish, the other witness was produced and testified, (Vol. I, p. 74). Mr. Fish was not asked anything about what may have happened when he appeared with petitioner before the Designated Examiner. Mr. Fish was not asked what may have happened in the Naturalization Court. Every time the courts below found a gap in the proof, the case was regarded as if petitioner were an alien resisting deportation, or an alien making application for citizenship. The burden in the courts below was placed upon petitioner. The courts below ignored the fact that the recitals to be found in the order for citizenship (Vol. II, p. 2) furnished a complete barrier to the theory upon which the revocation decree was founded. The decree was based upon the false assumption that the Naturalization Court depended en-

tirely upon the recommendation of the Designated Examiner. There was no proof to support this theory. There was no proof to show that both the Designated Examiner and the Naturalization Judge did not know all that which was proved in this trial, concerning the qualifications of the petitioner for citizenship. Insofar as the proof in the case at bar shows the Naturalization Court may very well have known a great deal more about petitioner than did Judge LaBuy. The courts below made haphazard findings of fraud with no basis in the evidence and with utter disregard of the limitations placed upon the Government by the allegations to be found in the complaint.

The District Judge, by implication, recognized that the Government was unable to prove its case without help to bolster it up by some sort of presumption. So the District Court said, (Vol. I, p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

When the Court of Appeals found in the contempt case, herein p. 85 that the District Court erred in the denial of the privilege, the Court of Appeals erred in refusing to notice that the District Court had thrown the refusal to answer into the scale against petitioner. All of this amounted to a penalty placed on petitioner because of his claim of privilege, a denial of due process.

VI.

Argument.

May it please the Court:

The abuse of the Federal Rules of Civil Procedure concerning pretrial practice carried on with the approval of the courts below calls for supervision and correction in this Honorable Court. The case at bar raises important questions as to the proper application of the Federal Rules of Civil Procedure.

We feel certain that a mere statement of the question should be sufficient to cause Your Honors to look further to see if our question arises from the records made below. Your Honors might compare that said by Mr. Justice Harlan in *Societe Internationale* v. *Rogers*, ... U.S. ..... It is obvious that Your Honors kept in mind the limitations placed upon rules of procedure by the Fifth Amendment and other guarantees of due process.

The advisory Committee on Rules made the following note concerning Rule 37, Federal Rules of Civil Procedure, Title 28, U.S.C.A., p. 138:

> "The provisions of this rule authorizing order establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 212 U.S. 322, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence and their unjustifiable use, as in *Hovey* v. *Elliott*, 1897, 167 U.S. 409, for the mere purpose of punishing for contempt."

In *Morrison* v. *California*, 291 U.S. 82, 88, Mr. Justice Cardoza said:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities of knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

Although *Morrison* involved questions not involved here, we call attention to it for the reason that it points up our argument. In the case at bar, the prosecution shifted the burden in preliminary pretrial procedure and secured the help of the District Judge in the application of reprisals because of the claim by petitioner of his privilege.

We quote from the memorandum filed by the District Court (Vol. I, p. 48):

> "The second motion is to compel the defendant to answer oral interrogatories posed at this deposition and which he refused to answer on the ground that he did not want to be a witness against himself and declared the privilege of the Fifth Amendment. The court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States* v. *Costello*, (D.C.N.Y., 1954) 16 F.R.D. 428, aff'd (C.A. 2, 1955) 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig*, (D.C.N.Y., 1954) 16 F.R.D. 138; *United States* v. *Jerome*, (D.C.N.Y., 1954) 16 F.R.D. 138."

Judge LaBuy failed to distinguish between the *Costello* case and the case at bar. One might read the opinion ren-

dered by the Court of Appeals in the contempt case, (here-in p. 85) without realization of the great difference between the *Costello* case and the case at bar. We respectfully submit that the power of supervision vested in this Honorable Court should prompt Your Honors to clarify the law upon the subject. Without such clarification, the opinions below will, no doubt, be used in furnishing prosecutors apparent authority to take advantage of naturalized citizens.

We respectfully submit that the contempt order helps to point up the manner in which the United States Attorney disregarded the rights given all naturalized citizens by Congress. The record shows that the Government officials started to build its case on what could be forced from petitioner. First with an administrative subpoena. Then the United States Attorney with a motion to strike the answer filed in the case at bar sought to compel petitioner to admit portions of the complaint in an answer. Then the Government filed interrogatories and took the position that the failure of petitioner to answer was binding as admissions. Then the United States Attorney sought oral answers in a deposition and obtained a rule to show cause. If the Government had had a case in the beginning, resort might not have been had to such procedure.

The law requires an affidavit showing good cause which means that the Government should be in possession of a good case before institution of this suit. The intent of Congress was to prevent what appears to have happened here, *i.e.* the institution of the suit and a search for the evidence afterwards.

When the defendant appeared in response to a notice he objected to being sworn. Although this is not a criminal proceeding it has been put in the same category. We re-

spectfully submit that the applicable rule has been stated in 16 C. J. S. §589 Constitutional Law, p. 1181 from which we quote:

> "As applied to a criminal prosecution, due process of law requires not only that accused after a plea of not guilty, shall not be put on his defense or deprived of his liberty until the state has produced evidence tending to prove that the crime charged has been committed and tending to connect accused with the commission thereof, but also that he shall not be convicted until the state has made out its case and removed the presumption of innocence by evidence establishing guilt beyond a reasonable doubt. * * * The due process provision of a constitution, whenever applicable, is a limitation in the enactment of statutory rules of evidence in criminal cases."

In the case at bar if we had nothing but the hundred questions asked by the prosecutor the District Court should have readily perceived the danger in which DeLucia has been placed by the Government. We have had the record in the contempt case certified here and have filed printed copies. It will be seen from this record that the District Court was duly informed from time to time of the position occupied by petitioner by reason of the procedure adopted.

The charge made by the Government included accusation of crime. It cannot be said that DeLucia is immune because of the passage of time. It would be easy to charge petitioner with a criminal conspiracy to enter this country unlawfully and to add to that charge that it was part of the conspiracy to keep him here as a citizen in order that he might assist the conspirators in the violation of other laws, concerning the importation of narcotics for instance.

The fact alone that the prosecutor chose to ask DeLucia about criminal charges made against relatives of DeLucia after DeLucia left Italy would be enough to cause DeLucia

to fear that the Government is working on some theory in order to bring DeLucia into a conspiracy with those relatives. Without some such theory the prosecutor could have had no legitimate interest in what the father and sister of DeLucia did after DeLucia left Italy.

The Government has a right to cancel citizenship but it must have a case to start with. Surely it has no right to start the suit and then fish for the evidence; no right to require the defendant to admit its case. Such practice violates due process of law. If petitioner could have answered questions and in some way limit his answers to this proceeding that would be one thing. But Your Honors know that his answers would probably have been used against him in criminal proceedings. Therefore the Fifth Amendment should be his protection if it means anything.

Under the Fifth Amendment to the Constitution a defendant in a "criminal case" cannot be compelled to be a witness against himself and need not take the stand to assert his privilege. *Bruno* v. *United States*, 308 U.S. 287; *Powell* v. *United States*, 226 F. 2d 269, 274 (App. D.C.); *cf. United States* v. *Scully*, 225 F. 2d 113, 115-116 (C. A. 2).

In contrast to the term "criminal prosecution" which appears in the Sixth Amendment guarantee of a jury trial, the Fifth Amendment's protection extends to "any criminal case."

Because the term "criminal case" in the Fifth Amendment is more inclusive than "criminal prosecution," the rule against requiring a defendant to be a witness against himself has been applied to defendants in various types of quasi-criminal proceedings. Where an action, though civil in form, is criminal in nature in that the conduct charged is criminal or the end sought is the imposition of a penalty or forfeiture, the privilege not to be a witness against him-

self is afforded to petitioner. As stated by Your Honors in *Boyd* v. *United States*, 116 U.S. 616, 634:

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *."

Following the *Boyd* doctrine, Your Honors, in a civil action to recover a penalty for illegal importation of contract labor, said:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case the defendant cannot be compelled to be a witness against himself. * * * [citing *Boyd* v. *United States*, 116 U. S. 616] * * * within the rule there laid down, it was error to compel this defendant to give testimony in behalf of the government." *Lees* v. *United States*, 150 U. S. 476, 480.

This rule has been followed in the lower courts in suits to recover penalities under the Wool Products Labeling Act, *United States* v. *Fishman*, 15 F. R. D. 124, 151 (D. C. N. Y.) and in actions for penalties for violation of price controls. *Bowles* v. *Dueck*, 7 F. R. D. 335, Case 1 (D. C. N. Y.).

See also *Hope* v. *Burns*, 6 F. R. D. 356 (D. C. Ky.), where defendant's motion to dismiss interrogatories was granted in a case involving a suit for gambling losses permitted by a Kentucky statute.

See *National Discount Corp.* v. *Holzbaugh*, 13 F. R. D. 236 (D. C. Mich.). In a civil action for conspiracy to defraud, defendant's deposition was being taken and during the course of such taking the Grand Jury sitting elsewhere

returned a criminal indictment against him on the same subject matter. The court enjoined further investigation of the defendant and impounded the testimony already taken, saying (at 237):

> "To require the defendant * * * to submit himself to the plaintiff for further oral examination in this civil action, wherein, in the opinion of this Court, the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending against him * * * would be oppressive and, at least, an indirect invasion of his constitutional rights."

Similarly, in civil actions in state courts where the main thrust of the complaint is criminal in nature, the courts have upheld the right of the defendant to refuse to take the stand at all. Thus, in an action against an administrator of an estate charging him with embezzlement of estate funds, the court granted a writ of habeas corpus to the defendant who was arrested for ignoring a subpoena served upon him, saying:

> "He is not in the same situation as a witness in an ordinary civil suit, who, to claim his protection, must first be sworn as a witness and then when a question is propounded to him, that to answer would criminate or tend to criminate him, must so declare under oath and invoke the protection of the law. * * * [his] situation as a witness is analogous to that of a defendant in a criminal suit by indictment or information. He may or may not testify as he elects. When he refused to be sworn as a witness he exercised a constitutional right, and is entitled to his discharge under writ of habeas corpus." *In re Green*, 86 Mo. App. 216.

And in *State* v. *Smith*, 56 S.D. 238, 288 N.W. 240, 250, the Supreme Court of South Dakota stated:

> "A person may not be subjected to inquisition or called as a witness by the State in any judicial in-

quiry which has for its primary objective the determination of that person's guilt or innocence of a given offense. In such investigations that person is, in actual fact, a party as distinguished from a witness and his constitutional rights must be determined according to the facts, regardless of the form of the proceeding."

Some indication of the scope of the term "criminal case" is supplied by the fact that grand jury proceedings have been considered to be criminal cases for the purposes of the Fifth Amendment. See Gold, *Privilege Against Self-Incrimination in Federal Grand Jury Proceedings*, 24 Temple L. J. 395-408 (1951).

Persons already accused of crime under indictment or information should not be called before the grand jury. *United States* v. *Lawn*, 115 F. Supp. 674 (D.C.N.Y.); *Malloney* v. *United States*, 79 F. 2d 566, 578-579 (C.A. 1); *United States* v. *Miller*, 80 F. Supp. 979, 981 (D.C. Pa.).

Even when a witness has not been formally accused of a crime, if his activities are the subject of grand jury investigation, some courts have recognized his right not to be a witness. *People* v. *Gillette*, 126 App. Div. 665, 668, 111 N.Y.S. 133, 135, where the court said, "When he took the oath, he thereupon became a witness, and the constitutional provision is that he could not 'be compelled in any criminal case to be a witness for himself;' " *People* v. *Bermel*, 71 Misc. 356, 357, 128 N.Y.S. 524, 525, where the court said, "if he be in fact the party proceeded against, he cannot be subpoenaed and sworn, even though he claim no privilege." In both cases, perjury indictments, based on defendant's compelled testimony before grand juries, were dismissed. And compare *United States* v. *Monia*, 317 U.S. 424, 430, where an immunity statute was interpreted to afford immunity to witnesses before a grand jury whether they claimed the privilege or not.

While the rule that a witness before a grand jury which is primarily investigating his actions occupies the same status as one already indicted has not generally prevailed in the federal courts, *O'Connell v. United States*, 40 F. 2d 201, 205 (C.A. 2), the Court has taken cognizance of the distinction between an ordinary witness and one accused of crime. In *United States* v. *Scully*, 225 F. 2d 113, 116, the Court said:

> "Indeed one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit."

And the constitutionality of such procedure has been questioned by the court in *Powell* v. *United States*, 206 F. 2d 269, 274:

> "No doubt it would be a boon to prosecutors if they could summon before a grand jury a person against whom an indictment is being sought and there interrogate him * * *. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

Where witnesses, not yet formally accused of crime, appear before investigating bodies and invoke the privilege as to all questions (including such items as age and residence) urging that the investigation is, in fact, directed against their personal activities as surely as if they were under indictment, the courts have been far more lenient than in the case of the ordinary contumacious witness. They have taken the view that it would be wrong to sustain a contempt conviction and idle to send the witness back to answer the few remotely relevant questions that can-

not be characterized as self-incriminating. *Maffie* v. *United States*, 209 F. 2d 225, 231 (C.A. 1). *Aiuppa* v. *United States*, 201 F. 2d 287 (C.A. 6); *United States* v. *Vadner*, 119 F. Supp. 330 (D.C. Pa.); *cf. Carlson* v. *United States*, 209 F. 2d 209 (C.A. 1).

It seems quite clear that there has been a growing judicial recognition that the liberal protections of the Fifth Amendment cannot be frustrated by semantic strictures.

The development is traced in detail in Judge Frank's dissenting opinion in *United States* v. *Grunewald*, 233 F. 2d 556. We quote from Judge Frank, p. 576:

> "No one who legitimately exercises the constitutional privilege ought to be so placed that he must subsequently justify it to a jury."

In the case at bar the District Judge tried the facts but that shouldn't change the principle. Judge Frank explained the manner in which Mr. Justice Harlan favored the same view in *United States* v. *Noto*, 226 F2 953, 954, 351 U.S. 902.

Whether the action is technically labeled civil or criminal or quasi-criminal, the root of the matter is that Fifth Amendment protection applies wherever the individual who is sought to be sworn as a witness against himself is in a situation like that of a criminal defendant.

We have shown that the term "criminal case" as used in the Fifth Amendment is not equivalent to criminal prosecution and that the courts have interpreted it to include various types of quasi-criminal proceedings.

Indeed, the Court of Appeals in *Minker*, 217 F. 2d 350 (C.A. 3), affirmed 350 U.S. 179, gave special recognition to the quasi-criminal nature of denaturalization, saying (at 352-353):

"Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences. The Supreme Court has recognized this by requiring a strictness of proof in denaturalization cases which approximates that imposed in criminal cases. Schneiderman v. United States, 1943, 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Baumgartner v. United States, 1944, 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525. And a court of appeals has recently held that the rule of strict construction of penal statutes applies to legislation of 'punitive impact' very much like denaturalization. Mangaoang v. Boyd, 9 Cir., 1953, 205 F. 2d 553. We think this is sound and salutary doctrine."

The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed the admonishments of this Honorable Court.

The Court of Appeals failed to cite *United States* v. *Minerich*, 250 F. 2nd. 721, 726, wherein Judge Finnegan noted that decisions made in this Honorable Court require a different reading of the Federal Rules of Civil Procedure, Rule 52, 28 U.S.C.A. In the case at bar the Court of Appeals either accepted the findings of the District Court after giving them the force usually required by Rule 52, or the Court of Appeals, for some undisclosed reason, failed to notice that the findings were not supported by the evidence. The findings were insufficient to support the decree. After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your

Honors will re-examine the record to determine if mistakes have been made. We quote from *United States* v. *Gypsum Co.*, 333 U.S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In the case at bar we go further and contend that findings were made with absolutely no evidence to support them.

We respectfully suggest that first Your Honors should reject haphazard general findings, not based upon proper allegations to be found in the complaint.

In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.

Your Honors, speaking through Mr. Justice Murphy in *Schneiderman* v. *United States*, 320 U.S. 118, 160 said:

> "A denaturalization suit is not a criminal proceeding But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

The only use of the word, fraud, to be found in the complaint, is in ¶ 8, (Vol. I, p. 5) to the effect that the Certificate of Arrival was obtained by means of false and fraudulent representations.

The District Judge made no finding based upon this charge. There was not a line of evidence to show any representation, true or false, made by petitioner to the officials who did issue the Certificate. District Judge Peirson M. Hall, S.D. California in *United States* v. *Kusche*,

56 F. Supp. 201, 230, has made a list of the steps required of an alien desiring to become a citizen. In the absence of proof to the contrary, it must be assumed in the case at bar that these steps were taken by petitioner.

The conclusion of law in the courts below was that the certificate was illegally and fraudulently procured. The findings are general. It is impossible to ascertain from them upon what underlying facts the District Court relied. It is impossible to determine upon what findings the Court of Appeals affirmed.

Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 130:

> "If it were not rendered unnecessary by the broad view we take of this case, we would be inclined to reverse and remand to the district court for the purpose of making adequate findings."

Your Honors, we respectfully submit, will find it impossible to determine upon what ground the Court of Appeals affirmed. No distinction was made by the District Court or the Court of Appeals between illegal procurement and fraud. No attention was paid in the courts below to the fact that Congress saw fit to change the law. Judge Finnegan, in *United States* v. *Minerich*, 250 F. 2nd 721, 730, recognized the problem:

> "Concealment of a material fact or * * * willful misrepresentation 'are the statutory alternative grounds authorizing revocation of an order admitting a person to citizenship. The question now arises on the words 'concealment' and 'material fact,' undefined in the current piece of legislation. There is a delusive exactness about those quoted words and their application here is heightened by the Congressional shift from the terms fraud and illegal procurement earlier laid down as the statutory basis for revocation. There

> are, of course, declarations and petitions filed by aliens in various stages of the naturalization process and without doubt such written documents were uppermost in the mind of the Congress when § 340 (a) was drafted. Providing for revocation when the certificate of naturalization is 'illegally procured' or obtained through 'fraud' present broader grounds than do either of the § 340 alternatives."

It will be noted that Mr. Justice Douglas concurring in *Schneiderman* v. *United States*, 320 U.S. 118, 161 said:

> "'Wrongful conduct'—like the statutory words 'fraud' or 'illegally procured'—are strong words. Fraud connotes perjury, concealment, falsification, misrepresentation or the like. But a certificate is illegally, as distinguished from fraudulently procured when it is obtained without compliance with a 'condition precedent to the authority of the Court to grant a petition for naturalization.'" *Maney* v. *United States*, 278 U.S. 17, 22.

In *Nowak* v. *United States*, ... U.S. ..... it will be noted that Mr. Justice Harlan kept the following classifications separate *i.e.*,

2. *Fraudulent Procurement.*
3. *Illegal Procurement.*

In *Schneiderman* v. *United States*, 320 U.S. 118, 176, Mr. Chief Justice Stone, dissenting referred to *Schwin* v. *United States*, 311 U.S. 616, where

> "We held, without dissent, 311 U.S. 616, 'that the certificate of citizenship was illegally procured,' and for that reason we affirmed a judgment cancelling it."

In a footnote entered by Chief Justice Stone we find:

> "The district court's decision was based on both fraud and illegality. The circuit court of appeals relied upon fraud alone, 112 F. 2d. 74, but our affirmance was rested 'on the sole ground' of illegality."

Mr. Chief Justice Stone said further, p. 177:

> "The purpose of § 15—like that of § 11, which authorizes the Government to appear in a naturalization proceeding to contest the application—is not merely to insure the formal regularity of the proceeding, but to protect the United States from the injury which would result from the acceptance as citizens of any who are not lawfully entitled to become citizens."

Your Honors will notice that Mr. Chief Justice Stone several times made reference to the five year probationary period. We respectfully suggest that if the Honorable members of this Court had been confronted with a case such as that at bar, where the alleged misconduct occurred, if at all, years previous to the probationary period, there would have been no dissent. Mr. Justice Murphy in *Schneiderman v. United States*, 320 118, 121 noted that the complaint charged that the certificate had been illegally procured, in that during the probationary period, Schneiderman had not behaved. Your Honors might search the complaint in the case at bar in vain for any charge based upon misbehaviour during the five year period. Mr. Justice Murphy said p. 122:

> "The Government proceeds here not upon the charge of fraud but upon the charge of illegal procurement."

The courts below failed to distinguish between illegal procurement and fraud. Further study may have shown that neither existed.

The order of naturalization entered in 1928 is res judicata. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree.

The certificate, (Vol. I, p. 324; Vol. II Ex. 5, p. 9) recites that the Court found that Paul DeLucia had in all respects

complied with the naturalization laws of the United States and that he was entitled to be admitted and it was thereupon ordered by the said Court that he be admitted as a citizen of the United States of America. We submit that these recitals are binding on all concerned and this should be the end of the case.

The judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. *Chicot County Dist. v. Bank*, 308 U.S. 371, 378; *United States* v. *Throckmorton*, 398, U.S. 61; *United States* v. *Richmond*, 17 F. 2d. 28. Whether a person is of good moral character is a fact which is shown by his behavior proved in naturalization proceeding and settled by judgment of naturalization. *United States* v. *Kusche*, 56 F. Supp. 201. We quote from the opinion of the Court of Appeals, herein p. 80:

> "It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 201. This effort has brought forth from government counsel this opus:
>
> > 'Res Judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 278 U.S. 17 and *United States* v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. * * * Surely the defense here has been thoroughly necrotized.'

"More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding."

We find nothing in the opinion rendered by Judge La Buy (Vol. I, pp. 325 to 336) to show that the District Court ruled specifically on the matter of *res judicata*. No doubt Judge La Buy considered that this defense had been disposed of when the District Court overruled (Vol. I, p. 14) the motion for Summary Judgment (Vol. I, p. 11). At any rate, the question is here presented to this Honorable Court. Mr. Justice Douglas speaking for this Honorable Court in *Knauer* v. *United States*, 328 U.S. 654, 670, said:

"II. It is said, however, that the issue of fraud may not be tried in this case. An analogy is sought to be drawn to those cases where relief against a prior judgment on the ground that perjured testimony was introduced at the trial, was denied. *United States* v. *Throckmorton*, 98 U.S. 61, 66. And see *Toledo Scale Co.* v. *Computing Scale Co.*, 261, U.S. 399, 421. But that rule goes no further than to say that the issue of fraud can become *res judicata* in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of naturalization. Those facts relate to the past-to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citi-

zenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated.

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court."

In a footnote Mr. Justice Douglas said:

9. At the time of Knauer's naturalization the Act provided:

"No alien shall be admitted to citizenship unless (1) immediately preceding that date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he had behaved as a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. At the hearing of the petition, residence in the county where the petitioner resides at the time of filing his petition, and the other qualifications required by this subdivision during such residence, shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by this Act to be included in the petition.' §6(b) of the Act of March 2, 1929, 45 Stat. 1512, 1513-1514 which replaced §4, subdivision Fourth, a similar provision of the Act of June 29, 1906, 34 Stat. 596, 598."

We repeat from that said above by Mr. Justice Douglas, p. 670:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization."

So Mr. Justice Douglas made it plain that Your Honors did not in *Knauer* find it necessary to decide the question now presented in the case at bar. In the case at bar the Court of Appeals avoided a direct answer to the question in the following which we again quote:

> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding."

Your Honors will note from the above quotation that the Court of Appeals followed the language of Section 340(a), which statute has been changed since *Knauer*. Section 340(a) provided for cancellation.

> "* * * on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation. * * *"

in order to further demonstrate how careful Your Honors were to keep *Knauer* within the limits of the question there presented, we quote further from Mr. Justice Douglas, p. 671:

> "We have recently considered the broad power of equity to set aside a decree for fraud practiced on the court which granted it. *Hazel-Atlas Co. Hartford Co.*, 322 U.S. 238. The present suit is an equity suit. *Luria v. United States*, 231 U. S. 9, 27-28. But we need not

consider in this case what the historic powers of equity might be in this situation. For Congress has provided that fraud is a basis for cancellation of certificates of naturalization in proceedings instituted by the United States."

p. 673:

"We do not have here a case where, after an alien has been naturalized Congress provides new grounds which are invoked for cancellation of his certificate.

* * *

"Moreover, we are not faced with the question of what limits there may be to conditions for denaturalization which Congress may provide. A certificate obtained by fraud is clearly within the reach of congressional power."

p. 674:

"Since fraud in the oath of allegiance which Knauer took is sufficient to sustain the judgment below, we do not reach the other questions which have been argued."

The reason we respectfully point out the limitations above placed by Your Honors upon the duty of this Honorable Court is that the case at bar presents the necessity of decision of some of the questions not reached in *Knauer*. One reason we have for quoting at such great length from *Knauer* is that we believe we find an implication that the questions submitted in the case at bar should be regarded as having been settled under *res judicata*.

Our questions require an understanding of the real basis of the decree entered by Judge La Buy. With all due respect to the Court of Appeals the answers are not given by a mere repitition of the language of §340(a).

In view of the determination in previous cases decided by this Honorable Court that Your Honors will re-examine the

findings made below, we respectfully direct Your Honors to the following questions which arise on this record.

(a) What concealments were made?

(b) What misrepresentations were made?

(c) To whom were they made?

(d) How did their making result in the entry of the order of naturalization?

(e) If all of this resulted in illegal procurement has not that ground been removed by Congress?

(f) If all of this amounts to fraudulent procurement

(1) Was the fraud such that traditionally vitiates judgments?

(2) If not such fraud is it within the reach of the statute?

(3) Do we have here a case where after an alien has been naturalized Congress has provided new grounds which are here invoked for cancellation of his certificate?

(4) What limits may there be to conditions for denaturalization which Congress may provide?

(5) To what extent do these haphazard findings of fraud really mean that the courts below gave the Government a trial *de novo* on issues of fact, the establishment of which Congress has made conditions precedent to naturalization?

(6) Was any fraud perpetrated on the Naturalization Court?

(7) If there be any issue of fraud perpetrated on the Naturalization Court, did not that issue become *res judicata* in the judgment sought to be set aside?

(8) Must not the act of admission be taken as final for any cause which may have existed at that time?

(9) If the act of admission be not taken as final, was it not the duty of the courts below to have made a clear and unequivocal statement of the grounds of revocation, not mere legal phrases?

(10) Should not all of these questions have been answered below?

After it is perceived by Your Honors that the case at bar raises important questions it should be an easy matter to demonstrate that the authorities cited by the Government on the subject of *res judicata* are of not much help.

Johannessen v. United States, 225 U.S. 227.

The certificate was based upon the perjured testimony of two witnesses that Johannessen had resided for the required period in the United States. If he could not meet this requirement the Naturalization Court had no jurisdiction so *United States v. Throckmorton*, 98 U.S. 61 did not apply. In the case at bar there is no finding of fact to be compared with *Johannessen* to attack the jurisdiction of the Naturalization Court.

United States v. Ness, 245 U.S. 319.

> "The filing of a certificate of arrival, as provided in §4, subdivision 2, of the Naturalization Act, is an essential prerequisite to a valid order of naturalization."

Ness admitted his failure to attach a certificate of arrival. Mr. Justice Brandeis said, p. 322:

> "It is urged that the certificate of arrival is merely a form of proof which the naturalization court has power to dispense with for cause. The uses served by the certificate, the history of the provision and its relation to other parts of the act show that this contention is unsound."

In the case at bar the complaint alleges (Vol. I, p. 5) that petitioner failed to attach a certificate of arrival. The Government proved this allegation to be false. (Vol. I, p. 322, Vol. II, p. 1)

The *Ness* case is of no value as a precedent in the case at bar aside from the fact that §340(a) is the result of a change on the part of Congress.

Maney v. *United States*, 278 U.S. 47.

No certificate of arrival was attached to the petition. Mr. Justice Holmes said, p. 22:

> "We are of opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the court."

The *Maney* case is not in point so there is no need to notice further differences.

United States v. *Ginsberg*, 243 U.S. 472.

Questions had been certified to this Honorable Court by the Court of Appeals. Citizenship had been irregularly granted after a hearing in chambers. Petitioner was not qualified by residence. No such questions were presented in the case at bar.

We believe it will be helpful for Your Honors to examine a case carefully decided by District Judges in New York. In *Petition of Field*, 117 F. Supp. 154 it appears that Mrs. Field had been granted citizenship and the Government moved under F.R. Civ. P. 60(b) 28 U.S.C.A. for an order to vacate. Judge Sugarman vacated and thereby put Mrs. Field back into the status of an alien making application for citizenship. Later the petition for naturalization was granted in *In re Field's Petition*, 159 F. Supp. 144 by Judge Dawson. We quote p. 146:

"The Immigration and Naturalization Service opposes the granting of citizenship to petitioner on the ground that petitioner obtained her immigration visa by a material misrepresentation, willfully and knowingly made, and that therefore the immigration visa was obtained by fraud, and admission of petitioner into the United States in possession of a visa so obtained is not a lawful admission for permanent residence, and hence she is ineligible for naturalization. The issue as presented is, therefore, primarily whether the petitioner has been lawfully admitted to the United States for permanent residence."

The importance of calling the attention of Your Honors to the *Field* case is that there the Government, as it should, recognized that entry into this country was a matter to be submitted to the jurisdiction of the District Court. We copy from the opinion of Judge Dawson p. 147:

(1, 2) The Court recognizes that there is an apparent disagreement among the courts as to whether a willful visa misrepresentation is always a material fraud where it may have the effect of hindering investigation of the applicant, or whether there must be a showing that the facts, if revealed, would have led to a denial of the visa. Cf. *Duran Garcia* v. *Neelly*, 5 Cir., 1957 F. 2d 287; *Landon* v. *Clarke*, 1 Cir., 1957 239 F. 2d 631; *Corrado* v. *United States*, 6 Cir., 1955, 227 F. 2d 780, certiorari denied 1956, 351 U.S. 925, 76 S. Ct. 781, 100 Ed. 1455, with *United States ex rel. Iorio* v. *Day*, *supra*; *Herrera-Roca* v. *Barber*, D.C. N.D. Cal. 1957, F. Supp. 492. This court finds that the rule of this circuit, which appears to be the most appropriate rule, is that not any misrepresentation warrants a finding of fraud or materiality, but that there must be a showing that the misrepresentation concealed facts which "might well have prompted a final refusal" of the visa, or "might have resulted in a proper refusal of the visa." *United States ex rel. Jankowski* v. *Shaughnessy*, 2 Cir., 1951, 186 F.

> 2d 580, 582; *United States* v. *Flores-Rodriguez*, 2 Cir., 1956, 237 F. 2d 405, 408. Such a showing may appear by the falsity in the visa application itself, as for example, where the applicant falsely denies ever having been convicted of a crime involving moral turpitude, but where the non-disclosure is of the nature shown in this case there must be a further showing of facts which would allow the Court to conclude that the misrepresentation was material."

It must be remembered that Judge Dawson was considering the problem presented to a Naturalization Judge at the time of application for citizenship. All of this confirms the soundness of our position here that the problem concerning the entry of DeLucia was one resolved by the Naturalization Court. Judge Dawson said, p. 148:

> "The Court therefore concludes that petitioner has been legally admitted to this country for permanent residence and is eligible for naturalization. No other issue has been raised for denying the naturalization of petitioner and the Court finds that she has satisfied the requirements for naturalization. The oath of naturalization shall be administered to the petitioner. So ordered."

Our argument in the case at bar can be understood if Your Honors will imagine the position or status to be occupied by Mrs. Field if the Government should prevail upon denaturalization proceedings and the courts below should indulge in haphazard findings of fraud, failing to recognize the validity of the judgment entered by Judge Dawson.

We examine the findings of fact as made by the District Court in the order they appear in the opinion rendered by Judge LaBuy (Vol. I, pp. 325 to 336). We endeavor to trace the findings of the District Court into that said by the Court of Appeals in each instance.

Findings made by the District Court concerning matters not in dispute might very well have confused the issue in the Court of Appeals.

It will be noted that Judge LaBuy said (Vol. I, p. 336):

> "This memorandum shall constitute the Findings of Fact and Conclusions of Law."

First the District Judge made a finding of fact not disputed. A fact previously admitted. Judge LaBuy said (Vol. I, p. 326):

> "The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928."

Then after a review of much evidence, Judge La Buy said (Vol. I p. 328):

> "It is the court's conclusion that this evidence clearly established that this defendant is the Paul DeLucia to whom a certificate of Naturalization was granted September 27, 1928; and that this defendant, Paul DeLucia, used the name Paul Maglio when he entered this country and when he applied for a certificate of Naturalization."

No harm comes to petitioner from all of this, if the reader of the memorandum is familiar with the record. Without the record one might conclude that this carefully documented finding was made necessary by a dispute over the facts here found. DeLucia announced in the beginning, (Vol. I p. 15) that his defense was based upon the claimed validity of the judgment of the Naturalization Court. Such claim could not have been made if any contest had been suggested as to whether petitioner was the same person who was granted the certificate. The defense of petitioner all through the case has been based upon the validity of the certificate.

The District Judge treated the matter of the name used by petitioner when he applied for naturalization as if it were a basic issue. As a matter of law, the name used was immaterial.

We quote further from Judge La Buy (Vol. I, p. 328):

> "The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization."

Then after reference to the evidence, Judge La Buy has stated (Vol. I, p. 329):

> "The court is of the opinion that the government has conclusively shown that the defendant, Paul DeLucia was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court."

There are to be found a number of conclusions here. In order to examine them we must repeat them separately. It may prove confusing to lump them together, as did Judge La Buy. The District Court covered three important steps here, *i.e.*,

(a) entry to this country
(b) preliminary papers
(c) fraud on the Naturalization Court.

If your Honors will keep these steps separate it will be helpful in disclosing here that the courts below failed to understand the force of the judgment of the Naturalization Court.

The Court of Appeals said, (herein p. 80):

> "The use by an alien of an assumed name to gain entry into the United States, is ground for deporta-

tion. *Landon* v. *Clarke*, 239 F 2d. 631, unless satisfactorily explained: *United States* v. *Schlofeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had DeLucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government."

Your Honors will note that cases such as *Landon* v. *Clarke*, 239 F. 2d 632 involving deportation of an alien are to be distinguished from the case at bar. The alien in such case has the burden of proof as to entry. Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 122:

> "This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status."

The courts below paid no heed to that said by Your Honors and continued to cite cases involving deportation and naturalization cases as authority for revocation. The courts below overlooked the difference in where rested the burden of proof. This may at first be difficult to believe, but the opinions rendered below stand as evidence of such a blunder on such a simple matter of law.

The courts below flew into the face of the uncontradicted evidence in assuming that:

> "No attempt to explain such use is made in this case."

The evidence leaves a void as to what explanation DeLucia may have made to the officials who issued the papers and passed him into this country. The evidence leaves a void as to what explanation DeLucia gave to Examiner Durish (Vol. I, p. 86). Durish did not remember the conversation. He could tell from his marks on the Exhibits that the subject of the use of more than one name was brought under discussion. The same discussion may have taken place between McKay and DeLucia. The record is void as to what explanation may have been given at this point.

As was said by Judge Levin in *United States* v. *Meli*, 158 F. Supp. 217, 220:

> "Hypothetical interpretations of nebulous symbols recorded twenty-eight years ago are not to be considered as clear, unequivocal, and convincing evidence which does not leave the issue in doubt."

The testimony leaves a void as to what explanation DeLucia may have given to the Naturalization Judge. The courts below do not make it clear as to when DeLucia was required to explain. If the requirement was to the Immigration Service, there is no evidence that DeLucia did not explain.

We again quote from Judge Finnegan in *United States* v. *Minerich*, 250 F. 2d 721, 731:

> "Silence at the time of naturalization is the basis here for seeking forfeiture of Minerich's citizenship. There is no evidence, whatever, that he did anything to prevent inquiry, or to elude investigation, mislead or hinder the officials charged with duties under the naturalization Act."

The circumstances in *Minerich* are different from those in the case at bar, but it is worthy of note that Judge

Finnegan had studied the record. Judge Finnegan did not cast the burden on Minerich every time a gap was found in the evidence. When the courts below made reference to the failure of DeLucia to testify at his trial in the District Court, another question was raised. The Court of Appeals said, we repeat, herein p. 80:

> "Had DeLucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government."

There is no evidence that De Lucia did not use his own name at all relevant times. His name at the time of entry was Paul Maglio. That was his name up to the time it was legally changed by the Naturalization Court. Judge LaBuy found that in Italy his name was Felice DeLucia, but without further findings, such fact was immaterial. Here again Your Honors will note that the path of inquiry had been opened. *Cf. In re Iwanenkos Petition*, 145 F. Supp. 838.

There is no evidence concerning what the Immigration Officials may have learned. What we do know for certain is that the Naturalization Court had before it the conduct of De Lucia during his probationary period and that that Court decided the matter in favor of citizenship.

Perjury must be false swearing as to a matter material. The name used does not appear to be material. Judge LaBuy must have realized that the use of a name alone would have been immaterial, so Judge LaBuy coupled such use with a finding that the use of a name prevented investigation into eligibility. There was no prevention or interference shown. The courts below ignored the absence of evidence concerning prevention or interference. Every step taken by De Lucia on his way to citizenship was fully investigated, insofar as is shown by the evidence.

Petitioner was eligible for citizenship and was found to have been eligible by the Naturalization Court.

Judge LaBuy concluded (p. 333):

> "The court is of the opinion that the foregoing evidence clearly established that Paul DeLucia and Felice DeLucia are one and the same person."

Your Honors will please note that Judge LaBuy refused to go any further than to find that the DeLucia on trial was in fact Felice DeLucia. Petitioner had a perfect right to sit by as the Government introduced a large number of exhibits, (Vol. II, pp. 12 to 43) intended to show that one Felice DeLucia had been convicted in Italy. This evidence at a future time during the trial may have been connected up by proof that the Felice DeLucia named in the foreign documents was in fact petitioner. This connection was not made. So the introduction of the foreign documents was harmless and should have been so held. We quote from *McCaskill Co. v. United States*, 216 U.S. 504, 517:

> "In other words, if the testimony was not followed up by other testimony which was necessary to give it effect, we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court."

The District Judge in the case at bar must have noticed that the connecting evidence never came. Judge LaBuy made no finding based upon the claim asserted by the Government that petitioner and Felice DeLucia named in the foreign documents were the same.

The Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body.

The Court of Appeals repeated the finding of Judge LaBuy (herein p. 79):

> "(6) that the evidence clearly established that Paul DeLucia and Felice DeLucia are one and the same person."

As we have said it will be noted by Your Honors that in the case at bar, the Government introduced a number of foreign documents, i.e., Exhibits Nos. 28, 36, 37, 38 and 39 (Vol. II, pp. 12 to 42) purporting to show conviction of one Felice DeLucia for homicide in Italy. Judge LaBuy did not find that the Felice DeLucia in these documents was the person on trial. It is assumed that Judge LaBuy recognized the rule of law that one inference could not be built upon another. The point had been made before Judge LaBuy that there had been no proof of the jurisdiction of the foreign court. No evidence was introduced concerning the law of Italy. Exhibit 38 (Vol. II, p. 26) reveals a conviction had against Felice DeLucia on July 23, 1954. Paul DeLucia landed on these shores August 20, 1920 and has been here since. The Felice DeLucia named in the foreign document purporting to show convictions was not proved to be the person on trial. At any rate, Judge LaBuy decided to not find that the person on trial is the same person named in those foreign documents. Judge LaBuy did say (p. 335):

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate granted to him."

The Court of Appeals said (herein p. 79):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts' it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

We respectfully submit to Your Honors that if Judge LaBuy had made the finding of fact said by the Court of Appeals it would have been like this:

> "DeLucia's failure to reveal his convictions for homicides in Italy prior to coming to this country vitiates the certificate of citizenship."

Such a finding would have been deficient, as there has been no previous finding that the Paul DeLucia on trial had been previously convicted. The finding would have been deficient also because of its omission of further elements. It does not specify to whom DeLucia failed to make revelation. Now that the Court of Appeals has made the above additional finding, we request Your Honors to look to the record in order to see that if Judge LaBuy had made it, it could not possibly meet approval. In other words, the Court of Appeals stretched the findings of the District Judge beyond the point where Judge LaBuy was willing to venture. In this manner the Court of Appeals has made findings, contradicted by the evidence and unsound as a matter of law.

Your Honors will note that the Court of Appeals in finding that DeLucia failed to reveal convictions, the Court of Appeals neglected to find just where the faiture took place. If in the preliminary papers or in the various interviews with Examiners there is no evidence of failure to reveal. If before the Naturalization Court, the Government left a

wide gap in its evidence. This, we submit, constitutes haphazard findings.

We quote from *Penna R. Co.* v. *Chamberlain*, 288 U.S. 333, 340:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the case of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

It is respectfully submitted in the case at bar that the courts below persisted in assuming facts shown to not have existed. In the case at bar, facts were shown to have not existed by the record made in 1928. No question of credibility of witnesses was involved. Your Honors can see from the record made in 1928 that certain facts existed. Such established facts preclude the inferences made by the courts below.

Mr. Justice Murphy said in *Schneiderman* v. *United States*, 320 U.S. 118, 122:

> "This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. So, whatever may be the rule in a naturalization proceeding (See *United States* v. *Manzi*, 276 U.S. 463, 467), in an action instituted under §15 for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.

In the case at bar we present the opposite. The Court of Appeals when it observed that the findings made in the District Court were unclear and ambiguous construed them against the citizen.

The failure upon the part of the Court of Appeals to re-examine the evidence to determine if the findings of Judge LaBuy were based upon the evidence caused the Court of Appeals to overlook the significance of the refusal of Judge LaBuy to find certain facts.

The complaint alleges (Appendix Vol. I, p. 4) that in his preliminary form (shown in the record as Government Exhibit No. 2, Vol. II, p. 3) petitioner alleged under oath that he had never been arrested. The complaint alleges further (p. 5):

> "IV. That in truth and in fact the defendant has been arrested and convicted for voluntary homicide under his true name of Felice DeLucia on May 18, 1917, at Naples, Italy."

The complaint alleges (pp. 5, 16) that upon the false representation that he had never been arrested the Service issued a Certificate of Arrival. That the concealments were made in the proceedings leading to his Naturalization to deceive the examiners and to conceal his lack of good moral character and lack of attachment, to induce the Service to recommend that his petition be granted and to preclude inquiry by the court concerning his qualifications.

In his opening statement, Mr. Bickley, the Assistant United States Attorney, said (Vol. I, p. 67) that the Government would show that petitioner concealed his prior arrests and convictions and sentences.

Yet Judge LaBuy did not find that petitioner had been arrested and convicted in Italy. Nor did Judge LaBuy find that, assuming that DeLucia had been arrested and convicted in Italy, that these facts had been concealed from the examiners, or from the Naturalization Court. Judge LaBuy could not have found without error that these matters were concealed from the Naturalization Court, in

the absence of evidence concerning what was heard on the subject by the Naturalization Court. Such finding would have been impotent in the face of the judgment. A finding by Judge LaBuy that petitioner did not reveal his arrests and convictions, assuming that there were such, could not have been made upon the evidence without error. The Examiners did not claim to remember the answers made by petitioner when he was questioned as to what petitioner meant when petitioner gave a negative answer to the question about arrests. We assume that Judge LaBuy refused to make findings of fact to fit the theory of the Government, as to alleged arrests and convictions in Italy, because of failure of proof. The Court of Appeals, held as we have said, in the absence of corresponding findings by Judge LaBuy, (herein p. 79):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

Again we say that if Judge LaBuy had made the finding, above quoted and added by the Court of Appeals, it would become the duty of Your Honors to re-examine the record to determine if any such finding was warranted.

The District Court announced a conclusion of law not applicable to the case at bar.

The courts below failed to distinguish between cases falling into the following catagories.

(1) Applications for citizenship.
(2) Revocation of citizenship.
(3) Deportation of aliens.

We next examine findings made by Judge LaBuy which may be classified as Conclusions of Law, or propositions of law mixed with assumptions of fact. We quote from Judge LaBuy (p. 333):

> "The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States."

We are not informed by the opinion of Judge LaBuy specifically as to how the above proposition was applied to the issues in the case at bar.

For the purpose of argument, if we assume that Judge LaBuy was correct in stating that the use of an assumed name to gain entry into the United States has been held to be ground for revocation, such statement is of no help in determining the issues in the case at bar. Each case must be considered in the light of its circumstances. As was said by Mr. Justice Frankfurter in *Baumgartner* v. U.S., 665,666:

> "As is true of the determination of all issues of falsity and fraud, the case depends on its own particular facts."

p. 670 "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U.S. 118. It was held that proof to bring about a loss of citizenship must be clear and unequivocal."

p. 675 "Non-fulfilment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and when established leave no room for discretion because Congress has left no area of discretion. But where the claim of 'illegality' really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, * * * ".

p. 676 "We are fully mindful that due observance of the law governing to grant citizenship to aliens touches the very well being of the Nation."

Judge LaBuy found, contrary to the facts, that an assumed name thwarted investigation. There was no proof that the investigation was hindered in any way.

Judge LaBuy said, p. 337:

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibilty for United States citizenship."

Judge LaBuy, without any evidence to support his conclusion assumed that the use of the name Maglio was un-

explained. There was not a scintilla of evidence to show that true identity was not disclosed. There is no evidence that any investigation has been thwarted or hampered in any way. The matter of identity and the name used came before the Naturalization Judge when petitioner was granted citizenship.

The Immigration Statute, Title 8 § 1447, provides for the change of name in the discretion of the court upon the bona fide prayer of the petitioner. A Naturalization Judge would no doubt obtain the facts before the exercise of discretion. The judge would naturally inquire to see if the prayer was bonafide. We are left to guess, without evidence, as to what the Naturalization Judge had been told. The important fact, overlooked by the courts below, is that the judgment of the Naturalization Court precludes this further inquiry into the eligibility of DeLucia for citizenship, concerning his conduct as a person of good moral character.

Judge LaBuy, as Your Honors perceive, has said that (p. 334):

> "* * * This defendant thwarted investigation as to his eligibility for United States Citizenship."

There is no evidence that any investigation was thwarted. Eligibility was defined by statute. Judge LaBuy has not pointed to one absent qualification. The entry was lawful, the required residence took place, the required procedure was observed. Character and fitness was passed upon by the Naturalization Court. It appears that every time the District Court found a gap in the evidence, Judge LaBuy not only concluded that it was unexplained, but the District

Court went further and held that it was incumbent upon petitioner to explain. The District Court, with the approval of the Court of Appeals, regarded petitioner as if he had been an alien seeking naturalization, or an alien endeavoring to resist deportation.

The effect to be given to the judgment admitting petitioner to citizenship was ignored.

The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.

We next consider the cases cited by Judge LaBuy under the following, (p. 333):

> "The fact that an applicant fails to reveal his criminal record is also grounds for cancellation of a naturalization certificate."
>
> *Corrado* v. *United States*, 227 F. 2d 780.

Several points distinguish this case from the case at bar. The defendant Corrado had been arrested numerous times, including arrests during his probationary period. The defendant testified in contradiction of the Preliminary Examiner, p. 782:

> "The trial judge indicated strongly that he believed the testimony of the preliminary examiner. The opinion of the trial judge on the credibility of witnesses, is of course, not reviewable on appeal.
>
> The brunt of appellant's complaints on this appeal is that, unless the Government could show that he would have been denied citizenship on the unproven charges made in the warrants of arrest, his citizenship should not be canceled now for his deception in the statement that he had never been arrested, especially in view of the fact that his only convictions were misdemeanors, or minor offenses."

Judge Martin said, (p. 783):

> "In *Knauer* v. *United States*, 328 U.S. 654 it is made plain that an appellate court must observe Civil Procedure Rule 52 (a), 28 U.S.C.A. which requires that due regard be given to the determination by the trial judge of the credibility of witnesses. The trial judge here stated clearly that he did not believe the testimony of appellant. He stated his belief to be that appellant 'deliberately falsified his position with the intent of misleading the examiner;' and that these false statements were material to the issue. The trial judge expressly found that the Government had relied upon the appellant's misrepresentation concerning the material matter of his arrests."

Your Honors will not discover any such finding in the opinion rendered by Judge LaBuy. The record is devoid of any evidence to support such a finding if it had been made. Your Honors will please keep in mind that in the case at bar there was no ground for the application of Rule 52 (a) in the manner it was applied in *Corrado*. In the case at bar no question concerning the credibility of any witness arose before Judge LaBuy. The Court of Appeals in the case at bar said:

> "The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization."

The Court of Appeals in support of this conclusion cited *Corrado* v. *United States* 227 F. 2nd 780. But the Court of Appeals failed to explain the manner in which said proposition had any connection with the questions presented in the case at bar.

We respectfully complain here of such haphazard findings. What is meant by the phrase "conceals from the government"? There is no evidence that petitioner concealed anything from the examiners. There is no evidence

that petitioner concealed anything from the Naturalization Court.

United States v. *Montalbano*, 236 F. 2d 757, 236 F. 757.

Montalbano was in State Prison serving a life sentence at the time the Government sued, 134 F. Supp. 230. The opinion of Judge Lord shows that he was indicted three days before he filed his declaration of intention. We quote p. 231:

> "The defendant testified that he had disclosed his arrests, but the examiners said they were not important if he had not served time. This testimony was clearly denied by the examiners and is unworthy of belief. The same defense was presented in *United States* v. *Corrado*, 121 F. Supp. 75, where citizenship was revoked."

The Court of Appeals in Montalbano said, p. 759:

> "The records clearly justify the conclusion that each defendant deliberately concealed his criminal record and in so doing committed fraud on the government which supports the revocation of citizenship."

Your Honors will please note that *Montalbano* and *Corrado* presented questions involving credibility of witnesses. The case at bar does no such thing. The examiners who testified in the case at bar were unable to give any testimony concerning what petitioner may have said because they did not remember him. Petitioner did not testify, so his credibility was not involved.

United States v. *Ashler*, 147 F. 2d 544.

This defendant was convicted of a felony and arrested several times during the critical period. Your Honors will note please that in the case at bar no question was raised concerning the probationary period. This fact alone distinguishes many of the cases cited. The courts below failed to observe this distinction.

United States v. *Accardo*, 208 F. 632.

The Court of Appeals adopted the opinion by Judge Hartshorne, 113 F. Supp. 783. After the defendant filed his Declaration of Intention and before his petition for citizenship, he was indicted and concealed the arrest. After his petition was approved and before his hearing, he was again indicted and was on bail at the time of his hearing. The subsequent conviction on this indictment showed that he had been engaged in criminal activity during his probationary period. Here again we remind Your Honors that in the case at bar, there was no allegation of any misconduct during the probationary period. No evidence was introduced to suggest that petitioner was not eligible because of misconduct during the probationary period.

Stevens v. *United States*, 190 F. 2d 880.

The District Court denied a petition for citizenship. The defendant appealed. The Court of Appeals had previously sent the case back directing the Naturalization Judge to make findings. Judge Major said in affirming the subsequent denial (p. 882):

> "* * * we must keep in mind that the burden is upon the petitioner to establish every condition upon which admission to citizenship is dependent."

The courts below in the case at bar failed to distinguish between cases involving application for citizenship and those where revocation was sought. Otherwise the *Stevens case* would not have been cited.

The District Court, with the approval of the Court of Appeals, erroneously threw into the scales an inference of guilt against petitioner for the reason that he availed himself of the protection of the Fifth Amendment.

We next examine the cases cited by Judge LaBuy under the following, (p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present

evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

The Court of Appeals said, (p. 79):

"The court pointed out that DeLucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf."

The Court of Appeals did not again cite the cases cited by Judge LaBuy. We are unable to ascertain from the opinion of the Court of Appeals just how much weight was given in that Court to the silence of DeLucia. All we know is that the Court of Appeals considered itself bound by the findings made by Judge LaBuy. We respectfully contend to Your Honors that the Court of Appeals should have perceived that the rule announced by the District Judge should not have been applied in the case at bar. The Court of Appeals adopted a rule, dangerous to due process, in conflict with the decisions of this Honorable Court. This is especially true in view of the fact that Judge LaBuy made a mistake in not recognizing the constitutional right of DeLucia to remain silent. It was error to draw unfavorable inferences from the exercise by petitioner of the right guaranteed him by the Fifth Amendment.

The Government was improperly permitted by the courts below to throw into the scale against him the assertion by petitioner of his Fifth Amendment privilege before a Notary Public.

The evidence before Judge La Buy was concluded April 10, 1957. (Vol. I, p. 243) Sixty-five days were allowed for briefs. The memorandum opinion rendered by Judge

LaBuy was filed June 7, 1957. (Vol. I, p. 325) Your Honors decided *Grunewald v. United States*, 353 U.S. 391, on May 27, 1957. The record gave counsel no warning in the advance of the opinion rendered by Judge LaBuy that the District Judge would apply a rule of evidence based upon the silence of DeLucia. The opinions rendered by the Court of Appeals were rendered June 18, 1958. The Court of Appeals did not refer to *Grunewald*.[9] Mr. Justice Harlan speaking for this Honorable Court said in *Grunewald*, p. 423:

> "But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used."

Mr. Justice Black, with whom the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan joined, concurring said, p. 425:

> "I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitu-

> tion. To the extent that approval of such a rule in *Raffel v. United States*, 271 U.S. 494, has vitality after *Johnson v. United States*, 318 U.S. 189, 196-199, I think the *Raffel* case should be explicitly overruled."

It will be remembered that in the case at bar there was no question of the credibility of DeLucia, or of any other witness. The question submitted in the case at bar appears to have been simple compared with *Grunewald*.

We repeat from the above quotation from Mr. Justice Black:

> "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."

In the case at bar, petitioner was penalized for reliance upon his privilege. The Court of Appeals perceived that it was improper to penalize petitioner to the extent of a fine for contempt, but the Court of Appeals failed to notice that Judge La Buy destroyed the constitutional privilege with a penalty far greater than a fine.* Judge La Buy made use of the claim of privilege to bolster up the case for the Government.

In *United States v. Minker*, 350 U.S. 179, Your Honors held that Section 235(a) of the Immigration and Nationality Act of 1952 does not empower an immigration officer to subpoena a naturalized citizen who is the subject of an investigation by the Service to testify in an administrative proceeding before such officer, where the purpose of the investigation is to determine whether good cause exists

* The Court of Appeals reversed the contempt sentence in a separate opinion, herein p. 85 but said nothing about the contempt in the case at bar.

for the institution of denaturalization proceedings against such citizen under § 340 (a) of the Act.

In the case at bar Your Honors are called upon to decide, after taking this step away from the officials, if the Government shall be permitted to retain the next step in the program.

Mr. Justice Douglas said concurring in *Minker*, p. 197:

> "There is another reason for reading the section narrowly. When we deal with citizenship we tread on sensitive ground. The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency. He is a member of a community included within the protection of all the guarantees of the Constitution. Those safeguards would be imperiled if prior to the institution of the proceedings the citizen could be compelled to be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him. I would require the Government to proceed with meticulous regard for the basic notions of Due Process which protect every vital right of the American citizen."

In the case at bar, the Government instituted its suit and then sought to compel the citizen to be a witness against himself and furnish out of his own mouth the evidence to be used to denaturalize him. As we have said, when petitioner refused to furnish such evidence out of his own mouth, the District Court, with the approval of the Court of Appeals punished him by regarding an insufficient case as sufficient.

In *Minker*, Mr. Justice Black concurring said, p. 195:

> "It seems even clearer that immigration officer's powers under § 235 are not applicable in denaturalization cases. Section 340 of Title III of the Act, 66 Stat.

260, 8 U.S.C. § 1451, provides for revocation of naturalization. Responsibility for initiating such cases is placed on district attorneys 'upon affidavit showing good cause therefor. . . .' Many of the grounds for denaturalization are also grounds for felony prosecutions. Under these circumstances it is not surprising that Congress expressly placed responsibility for instituting denaturalization proceedings on district attorneys, leaving them to summon persons to appear as witnesses in the traditional manner before grand juries or courts. It would have been surprising had Congress attempted to authorize the Nation's chief prosecuting officer and his subordinates to compel a citizen to appear in government private offices to answer questions in secret about that citizen's conduct, associations and beliefs. Some countries give such powers to their officials. It is to be hoped that this country never will."

Your Honors will note that Mr. Justice Black said concerning district attorneys:

> "* * * leaving them to summon persons to appear as witnesses in the traditional manner before grand juries or courts."

In the case at bar the District Attorney required petitioner to appear in his chambers before a Notary Public. Because of the refusal on the part of petitioner to cooperate and assist the Government, the courts below punished him by throwing his refusal into the scale against him.

Mr. Justice Frankfurter speaking for this Honorable Court in *Minker* said, p. 190:

> "All these considerations converge to the conclusion that Congress has not provided with sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations; therefore Congress is not to be deemed to have done so impliedly. Since this is so, we are

not called upon to consider whether Congress may empower an immigration officer to secure evidence, under the authority of a subpoena, from a citizen who is himself the subject of an investigation directed toward his denaturalization."

In the case at bar Your Honors are called upon to consider whether the Rules of Civil Procedure are to be regarded as authority for the District Attorney to secure evidence from a citizen against whom a suit has been brought seeking his naturalization.

Mr. Justice Black concurring in *Minker* said, p. 191:

"The immigration officer summoning Minker was not a judge or 'grand jury' of any kind, nor was he at the time acting in any quasi-judicial capacity. *Cf. In re Oliver*, 333 U.S. 257. He was acting under his broad power as a law enforcement officer to follow up clues and find information that might be useful in later civil or criminal prosecutions brought against persons suspected of violating the immigration and naturalization laws. See *e.g.* § 287, Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357; 8 CFR §§ 287.1-287.5. The object in summoning Minker was to interrogate him in the immigration officer's private chambers to try to elicit information 'relating to the possible institution of proceedings seeking the revocation of . . . (Minker's) naturalization. . .' Information so obtained might be used under some circumstances in court to take away Minker's American citizenship or convict him of perjury or some other crime. Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against

compulsory questioning by law enforcement officers behind closed doors. *McNabb* v. *United States*, 318 U.S. 332; *Upshaw* v. *United States*, 335 U.S. 410. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. See, *e.g.*, *Watts* v. *Indiana*, 338 U.S. 49; *Harris* v. *South Carolina*, 338 U.S. 68; *Chambers* v. *Florida*, 309 U.S. 227. Yet power of the Attorney General and Immigration officers to compel persons, including suspects, to appear and subject themselves to questioning by law enforcement officers in their private chambers is precisely what the Department of Justice claims here.

This is no less true because a federal judge must be called on to 'aid' the immigration officer in subjecting a summoned person to questioning. § 235(a), 66 Stat. 198, U.S.C. § 1225(a). For after a court order, as before, the person summoned must go to an immigration officer's private chambers for questioning by him, out of which may come a prosecution against the 'witness' for perjury or some other crime. A purpose to subject aliens, much less citizens, to a police practice so dangerous to individual liberty as this should not be read into an Act of Congress in the absence of a clear and unequivocal congressional mandate. I think the Act relied on here by the Department of Justice should not be so read. I would hold that immigration officers are wholly without statutory authority to summon persons, whether suspects or not, to testify in private as 'witnesses' in denaturalization matters. For this reason I concur in the Court's judgment in this case."

In the case at bar, the attorney for the Immigration Officer notified DeLucia to appear in his office before a Notary Public. The suit had been instituted upon suspicion, upon allegations later proved to have been false. To object in summoning DeLucia was to interrogate him in the office

of the United States Attorney. Your Honors in *Minker* considered the intent of Congress as to subpoena power. In the case at bar, Your Honors are respectfully requested to consider the same sort of practice which has continued by virtue of the Federal Rules of Civil Procedure. When the District Judge was informed that petitioner stood on his constitutional rights, that should have ended the matter. But, instead, the District Judge penalized petitioner by shifting the burden of proof to him in the civil proceeding. The remedy allowed by the Court of Appeals was the reversal of the contempt case. The shifted burden was permitted to stand.

We respectfully submit that the case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to millions of naturalized citizens. The question posed is

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate without evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals?

VIII.

Summary of Argument.

A mere statement of the question presented should require no argument. The question here posed is . . . has there been an abuse of the Federal Rules of Civil Procedure? Did the courts below overlook limitations placed upon the Rules by the law concerning due process. Were constitutional protections ignored? ..... p. 20.

We review some of the authorities to show that the procedure sanctioned by the court below should be compared

with bringing a prospective defendant before the prosecutor where he should be required to either prove his innocence or have his silence used against him. We assert that such program violates the spirit of our laws. ..... pp. 20 to 30.

The Court of Appeals erred in considering that it was bound by the findings of fact made by the District Court. The Court of Appeals failed to pay heed to the appropriate decisions rendered by this Honorable Court admonishing the Court of Appeals that in denaturalization cases, the upper courts have a duty to re-examine the findings of fact. ..... p. 30.

The courts below failed to observe the rule laid down by this Honorable Court to the effect that in denaturalizations cases the Government is limited to matters properly charged in the complaint. The courts below disregarded the complaint or accepted conclusions and made haphazard general findings. ..... p. 31.

The conclusion of law in the courts below was that the certificate was illegally and fraudulently procured. The findings are general. It is impossible to ascertain from them upon what underlying facts the District Court relied. It is impossible to determine from them upon what findings the Court of Appeals affirmed. The question presents itself as to whether or not this Honorable Court should remand to the District Court for the purpose of making adequate findings. ..... p. 32

The order of naturalization entered in 1928 is *res judicata*. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge LaBuy to support the decree. ..... p. 34.

In order to argue the apparent deficiencies existing in the findings made below, we respectfully pose a number of questions. ..... p. 40.

We argue the case cited by the District Judge are not of much help. ..... p. 41.

We point out that findings made by the District Court concerning matters not in dispute might very well have confused the issue in the Court of Appeals. ..... p. 45.

We point out that the District Judge treated the matter of the name used by petitioner when he applied for naturalization as if it were a basic issue. As a matter of law, the name used was immaterial. ..... p. 46.

We point out that the Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body. ..... p. 51.

We point out that the failure upon the part of the Court of Appeals to re-examine the evidence to determine if the findings of Judge LaBuy were based upon the evidence caused the Court of Appeals to overlook the significance of the refusal of Judge LaBuy to find certain facts. p. 54.

We argue that the District Court failed to distinguish between cases falling into the following categories, namely

(1) Applications for citizenship.

(2) Revocation of citizenship.

(3) Deportation of aliens. ..... p. 55.

We assert that the District Court announced a conclusion of law not applicable to the case at bar. An examination of the cases on the subject of name demonstrates a failure to distinguish cases. ..... p. 56.

We argue that Judge LaBuy found, contrary to the facts, that an assumed name thwarted investigation. There was not proof that the investigation was hindered in any way. ..... p. 57.

We argue that the District Court found as a fact that investigation had been thwarted, which finding was contradicted by the evidence. ..... p. 58.

We argue that the District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract applicable. p. 59.

We argue that the Government was improperly permitted by the courts below to throw into the scale against him the assertion by petitioner of his Fifth Amendment privilege before a Notary Public ..... p. 62.

IX.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit, that the decree and judgment be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Paul De Lucia

By
Wm. Scott Stewart

Counsel for Petitioner.

Opinions

In the

United States Court of Appeals

For the Seventh Circuit

No. 12093 SEPTEMBER TERM, 1957. APRIL SESSION, 1958.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL DE LUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1958

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a denaturalization proceeding in which §340(a) of the Immigration and Naturalization Act of 1952[1] was invoked to sustain the jurisdiction of the district court, a decree was entered on June 11, 1957, revoking, setting aside and making void an order of said court, entered September 27, 1928, admitting Paul De Lucia, also known as Felice De Lucia, to citizenship. From that decree De Lucia has appealed.

In the denaturalization proceeding, appellee, sometimes hereinafter referred to as the government, filed its complaint on October 10, 1956 against De Lucia, and there was attached thereto an affidavit by Charles Gordon, Re-

gional Counsel for the Northwest Region, Immigration and Naturalization Service, United States Department of Justice, dated August 9, 1956, as required by said § 340 (a). In his affidavit Gordon deposed and said that, as said Regional Counsel, he had access to the official records of said Service, "from which the following facts appear: * * *." There follows a recital of pertinent facts as to De Lucia.

Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under the pretense that it shows good cause, affiant's assertions therein are not dependent upon his knowledge, and that, although he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his "opinion as to what may be shown by some files."

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, ... U.S. .....[2] In accordance with that decision, we hold the Gordon affidavit sufficient.

The complaint alleged that on or about April 10, 1928, pursuant to the Immigration and Naturalization Act of June 29, 1906, De Lucia, who was born in Naples, Italy, on or about November 14, 1897, filed in the court below a petition for naturalization in the name of Paul Maglio, and therein prayed that his name be changed to Paul De Lucia; that on September 27, 1928 that court admitted him to citizenship.

The complaint further alleged that in his declaration of intention dated January 9, 1925, attached to and made a part of his petition, De Lucia alleged under oath that his name was Paul Maglio and that he had been born in Apricena, Italy on July 10, 1898; that in the preliminary form of the petition for naturalization dated February 21, 1928 he stated that his full, true and correct name was Paul Maglio; that he had used the name of Paul De Lucia because he "got married on that name"; that his mother's name was Torelli Nunzia Maria; that he was born July

[2] No. 72, October term, 1957, decided May 26, 1958.

10, 1898, in Apricena, Italy; that he arrived in the United States at New York August 10, 1920, on the SS Ryndam; and that he further alleged under oath that he had never been arrested.

The complaint further alleged that De Lucia, in his petition for naturalization aforesaid, alleged under oath that his name was Paul Maglio; that he was born on July 10, 1898 in Apricena, Italy; that he had arrived in New York at the port of New York City on August 10, 1920 on the vessel Ryndam.

The complaint charged further that the aforesaid allegations of De Lucia were false and known by him to be false in the following particulars:

(I) His name was Felice De Lucia and not Paul Maglio;

(II) He was born November 14, 1897 in Naples, Italy and not on July 10, 1898 in Apricena, Italy;

(III) His mother's name was Maria Annunziata and not Torelli Nunzia Maria;

(IV) He had been arrested and convicted of voluntary homicide under his true name of Felice De Lucia on May 18, 1917 in Naples, Italy;

(V) De Lucia's entry into the United States at New York City on August 12 (*sic*) 1920 was unlawful and there was not attached to his petition for naturafization a certificate of arrival for a lawful entry into the United States for permanent residence.

The complaint further charged that De Lucia assumed the identity of Paul Maglio in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the naturalization court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy; and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

The complaint further charged that the Immigration and Naturalization Service, relying upon the foregoing false and fraudulent representations by De Lucia, did issue a

certificate of arrival in the name of Paul Maglio, which De Lucia appended to his petition for naturalization; that the concealments and misrepresentations of De Lucia heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States; that the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States, to prevent the making of a full and proper investigation of his qualifications for citizenship, to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts, to make the unconditional recommendation to the court that his petition for naturalization be granted, and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law; that the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above.

The complaint prayed for a decree revoking and setting aside the order of the court admitting De Lucia to citizenship, and for general relief.

Defendant filed an answer denying every allegation in the complaint.

Following a trial before the court, the trial judge filed a memorandum which was ordered to constitute findings of fact and conclusions of law. De Lucia's motion for a new trial was overruled and the decree of denaturalization, from which this appeal is taken, was entered.

To establish its case the government introduced evidence, consisting of documentary exhibits, the oral testimony of various witnesses and the deposition of another. De Lucia offered no evidence.

In its memorandum, after a detailed recital of the relevant evidence, the court found (1) that defendant is the Paul De Lucia to whom a certificate of naturalization was granted September 27, 1928 and that he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; (2) that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; (3) that he falsely assumed the name of Paul Maglio to enter this country; (4) that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and (5) thereby committed a fraud on the court, and also (6) that the evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person. The court further found (7) that in an application for citizenship it is indispensable that true identity be disclosed, and (8) that the unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf.

The court stated as a conclusion that De Lucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office.

The court held that the use by De Lucia of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him.

While the court did not expressly indicate what it meant by the words "the concealment of other material facts", it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum.

We are aware that, when the government seeks to de-

which must be met with evidence of a clear and convincing character. *Schneiderman* v. *United States*, 320 U.S. 118, 123. From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and, therefore, we are bound by those findings.

Its conclusions of law and the decree which it entered find ample support in the decided federal cases.

The use by an alien of an assumed name to gain entry into the United States, is ground for deportation, *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States* v. *Schlotfeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization, is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.

The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization, *Stevens* v. *United States*, 190 F. 2d 880, or for ordering denaturalization, *United States* v. *Usher*, 147 F. 2d 544; *United States* v. *Manfalbano*, 236 F. 2d 757; *Corrado* v. *United States*, 227 F. 2d 780; *United States* v. *Accardo*, 208 F. 2d 632, adopting 113 F. Supp. 783.

It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 291. This effort has brought forth from government counsel this opus:

> "Res judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released, first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 278 U.S. 17, and *United States*

> v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful mis-representation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. . . . Surely the defense here has been thoroughly necrotized."

More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and mis-representations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding.

In his brief De Lucia, under Proposition of Law VI, states: "The Trial Court erred in admitting the exhibits and giving them probative value." He cites no authorities in support of this statement. He merely says "See Argument," without referring to any part of the argument and certainly to no page number. The argument consists of 90 pages of printed matter running continuously without titles or breaks, and we do not feel obligated to attempt to locate the part to which reference is intended to be made by counsel.

Again, he states in Proposition of Law VII, the following:

> "It was error for the Trial Court to allow evidence of custom and to give same probative value."

He cites *Cafari v. United States*, 217 F. 2d 404, which furnishes a clue enabling us to locate the part of his argument which pertains to this proposition.

We construe De Lucia's contention that it was error "to allow evidence of custom" to mean that the evidence of custom in this case was inadmissible because it was incompetent. However, only the question of *materiality* (not *competency*) was raised by his objection to the admission of two basic government exhibits, a preliminary form for petition for naturalization, and a document known as a face brief. These documents were introduced by the government on the theory that they were made according to the established custom and practice in the Service.

It is elementary that De Lucia, having objected to the admissibility of these exhibits solely on the issue of materiality, is in no position to raise in this court an objection to their competency as evidence.[3] "Materiality", with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the same, while evidence is competent if it is fit for the purpose for which it is offered. 31 C.J.S. 868, 906. "Competency", in the law of evidence, is the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice; — applied, in the same sense, to documents or other written evidence. Black's Law Dictionary (1950) 355.

However, it is clear to us that, on the basis of evidence of custom in the naturalization service,[4] these documents

[3] *Employers Mut. Casualty Co. v. Johnson*, 201 F. 2d 153, 155.

28 U.S.C.A. rule 46 provides:

"* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court * * his objection to the action of the court and his *grounds* therefor; * * *." (Emphasis supplied.)

[4] It appears from the testimony of Andrew Jordan, who is a retired district director of immigration and naturalization, that he was familiar with the custom in the naturalization service and knew the handwriting of George McKay (McKay died before the trial) and Stephen Durisch, that on the face brief he made a pencil notation "J" indicating himself and "9-27-28" indicating date of admission on final hearing. He also testified that the initials "G.M." under the heading "Adjournments" and following the words and figures "from APR 10 10-28" were written by examiner McKay, and that the handwriting under the heading "Result of Examination" and the notation "Arr. no" is in the handwriting of examiner Durisch.

In reference to question 24 in preliminary form for petition for naturalization, which reads: "Have you ever been arrested?", followed by the word "no" in handwriting, Jordan testified that a pencil check mark above the word "no", according to the practice, would indicate that either the preliminary examiner or the designated examiner made the check mark at the time he was questioning the petitioner and that the applicant answered "no".

Durisch testified that all of the handwriting in ink on the front of the face brief is his, and that his initials "SD" appear thereon. He further testified that the date August 10, 1920 on the face brief indicates when the naturalization petitioner arrived in the United States, and his continuous residence thereafter, and that "Arr. no" means applicant was asked whether he had been arrested and that his answer was "no".

As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant and that the latter's oral answer agreed with that on the preliminary form.

All of this testimony was given without objection.

were admissible. Nothing in the *Cufari* case indicates that such records are not admissible. In fact, no such question was there raised. The court said, at 408:

> "The controlling question here * * * is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative."

The court then, at 409, proceeded to consider a docket slip, being Labor Form 2328 (which is similar to the face brief in this case), and also the testimony of the district director of immigration and naturalization as to the practice of examiners in asking applicants for citizenship if they had ever been arrested and noting applicants' answers on their docket slips. The court did not have before it and did not discuss any question as to the admissibility of such evidence. Hence the *Cufari* case is no authority on that question. As to the *effect* to be given to such evidence, the court held:

> "No doubt Cufari's docket slip coupled with the evidence of the practice and custom of Examiners generally and of Examiners Davis and Mahoney in particular is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not. * * *"

Thereupon, the court went on to decide the case *upon the foregoing evidence*, considered in connection with the fact that *Cufari, testifying on his own behalf, said that he had no recollection of being asked about arrests either at his preliminary examination or at the hearing on his petition in court.* Differing from the lower court's conclusion, it held that the government had not proved its case by that clear, unequivocal and convincing evidence which did not leave the issue in doubt, and hence it reversed the district court. But in the case at bar, De Lucia did *not* testify and there was no contradictory evidence leaving the issue in doubt.

For the reasons herein set forth, the decree of the district court is affirmed.

AFFIRMED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12094 SEPTEMBER TERM, 1957 APRIL SESSION, 1958

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PAUL DE LUCIA, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1958

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant appeals from an order of the district court adjudging him guilty of contempt of that court in violating an order entered in the case of *United States of America* v. *Paul De Lucia,* then pending in said court, and fining him $500 therefor.

It appears that, while a denaturalization proceeding brought against De Lucia was pending in the district court,[1] the government proceeded to take his deposition before a notary public, where he was duly sworn, and that (according to an affidavit of the assistant United States attorney assigned to the prosecution of the denaturalization case), during the course of the examination,

[1] An appeal from a judgment against De Lucia in said case was heard in this court. We affirmed. ..... F. 2d .....

government counsel asked De Lucia a series of questions, and that, "on the advice of his attorney William Scott Stewart, and also on his own initiative the defendant refused to answer the questions on the basis of the Fifth Amendment to the Constitution of the United States, asserting that to answer the same would tend to incriminate him."

The examination by government counsel commenced, as follows:

Q. Will you state your name?

A. Paul De Lucia.

Q. Where do you live, sir?

A. 1515 Bonnie Brae, River Forest.

Q. Mr. De Lucia, on January 9 of 1925, did you file with the Clerk of the Circuit Court of Cook County a declaration of intention, No. 162822, to become a citizen of the United States of America under the name of Paul Maglio?

A. I respectfully refuse to answer. I don't want to be witness against myself, and I will declare the privilege of the Fifth Amendment.

Q. And at this time, you honestly believe that if you answered that question, you would tend to incriminate yourself?

A. I refuse to answer.

Mr. Stewart: He refuses to answer that question, too.

Mr. Bickley (government attorney): Q. Mr. De Lucia, on February 21, 1928, did you cause to be filed with the District Director of Naturalization in the Federal Building, Chicago, Illinois, your preliminary form for petition for naturalization, No. 370-55072, under the name of Paul Maglio?

A. I refuse to answer for the same reason.

Q. Do you honestly believe that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

The interrogation by government counsel proceeded along the same general lines and the record shows that De Lucia's answer as aforesaid was repeated over 100 times.

The notary public, having certified to the court the aforesaid proceedings, the court, on the government's

motion, ordered that defendant answer the oral interrogatories posed at his deposition within three days. Thereafter the government showed De Lucia had failed to answer said interrogatories and moved the court to enter a rule on him to show cause why he should not be held in contempt of court, upon which motion the court deferred its ruling until after the trial of the denaturalization case. On the same day the court denied defendant's motion for reconsideration of its order requiring defendant to answer oral interrogatories. After the trial in the denaturalization case had ended, the district court allowed the government's motion for a rule to show cause and granted defendant 10 days to answer the rule, which he did. He therein relied, *inter alia*, upon "the privilege guaranteed by the Fifth Amendment". The contempt order followed.

The law is settled that the provision of the Fifth Amendment "that no person * * * shall be compelled in any criminal case to be a witness against himself" must be accorded liberal construction in favor of the right it was intended to secure. *Hoffman* v. *United States*, 341 U.S. 479, 486. It has also been held that the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman* v. *United States*, *supra*, and *Blau* v. *United States*, 340 U.S. 159.

In the *Hoffman* case, the court said, at 486:

> "* * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. 'The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'"

It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the

notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court.

Therefore, the order from which this appeal has been taken, is reversed.

REVERSED.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

PAUL DE LUCIA, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 75-83) is not yet reported. The memorandum of the District Court (R. I, 325-336) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1958 (Pet. 75). The petition for a writ of certiorari was filed on August 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a denaturalization proceeding, the district court's findings that naturalization had been procured by wilful misrepresentation and concealment of material facts were supported by the evidence.

2. Whether an order of naturalization is *res judicata* and not subject to attack for misrepresentation and concealment.

3. Whether the District Court improperly noted petitioner's failure to testify.

STATUTE INVOLVED

Section 340(a) of the Immigration and Naturalization Act of 1952 (66 Stat. 260), 8 U.S.C. 1451(a) provides in pertinent part:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *.

STATEMENT

On October 10, 1956, a complaint was filed in the United States District Court for the Northern District of Illinois, under Section 340(a) of the Immigration and Naturalization Act of 1952, to cancel a certificate of naturalization granted petitioner on September 27, 1928, on the grounds that it had been procured by concealment of material facts and wilful misrepresentation (R. I, 3-7). Following a trial before the court, a decree of denaturalization was entered on June 11, 1957 (R. I, 338-339). The Court of Appeals affirmed.

The complaint (R. I, 3-7), which was accompanied by an affidavit of the Regional Counsel of the Immigration Service (R. I, 8-10), alleged that petitioner had falsely stated under oath, in documents filed and testimony given preparatory to his naturalization, that his name was Paul Maglio; that he had been born in Apricena, Italy, on July 10, 1898; that his mother's name was Torelli Nunzia Marie; that he had arrived in the United States at New York on August 10, 1920 on the SS RYNDAM; and that he had never been arrested. The complaint alleged that, in truth and fact, petitioner's name was Felice De Lucia; that he had been born on November 14, 1897, in Naples, Italy; that his mother's name was Maria Annunziata; that he had been convicted of voluntary homicide in Naples in May, 1917; and that he had entered the United States unlawfully on August 12, 1920. The complaint asserted further that petitioner had falsely and fraudulently represented that he was Paul Maglio at the time of his arrival and in naturalization proceedings to conceal his

criminal record in Italy and to procure his naturalization in violation of law.[1]

1. Prior to trial, petitioner was called as a witness in an attempt to take his deposition pursuant to the Federal Rules of Civil Procedure. He stated that his name was Paul De Lucia and gave his address, but refused to answer any further question, stating that he did not want to be a witness against himself (R. I, 21-33, 23). The United States Attorney filed a motion to show cause why petitioner should not be held in contempt for his subsequent refusal to answer in compliance with an order of the court (R. I, 47-49). The court deferred a ruling on the motion until the conclusion of the trial (R. I, 63). After trial petitioner was adjudged guilty of contempt. The Court of Appeals reversed, holding that petitioner was entitled to rely upon his privilege under the Fifth Amendment (Pet. 85-88).

2. The evidence may be summarized briefly as follows:[2]

Petitioner was identified as Paul De Lucia by two United States District Court deputy clerks and a deputy marshal who witnessed petitioner's signature on court bonds and prison records (R. I, 213-217, 205-209). He was also identified as Paul De Lucia by a friend, Fish, who had witnessed his petition for naturalization (R. I, 74-77, R. II, 1).

The petition for naturalization witnessed by Fish, the preliminary form therefor and a declaration of intention were all made in the name of, and signed by "Paul Maglio", the applicant requesting that his name

[1] The affidavit filed with the complaint contained similar recitals (R. I, 8-10).

[2] The evidence is summarized in greater detail in the opinion of the District Court (R. I, 325-336).

be changed to "Paul De Lucia" (R. II, 1-8); a name which he represented he was then using because he "got married on that name" (R. I, 315). On these documents the applicant represented further, *inter alia*, that he had been born in Apricena, Italy on July 10, 1898; that his mother's maiden name was Nunzia Maria Torelli; that he was married January 3, 1927, and his wife's name was Nancy, born October 2, 1905 in Naples, Italy; and that he had never been arrested. The certificate of naturalization was granted in the name of, and signed by, "Paul De Lucia" on September 27, 1928 (R. II, 9). A handwriting expert, comparing the signatures of "Paul De Lucia" and "Paul Maglio" on all of the naturalization papers with the known signatures of petitioner, found them to have been written by the same person (R. I, 229).

The government then produced a witness who testified that his own name was Paul Maglio, that petitioner was not related to him in any way and that he had never seen petitioner before in his life (R. I, 131). The witness testified that he himself had been born in Apricena, Italy on July 10, 1898; that his mother's maiden name was Nunzia Maria Torelli; and that he had four sisters, Adele, Rosa, Angole and Alvire (R. I, 116-117). He identified photographs of his family and numerous foreign documents of his personal and family history (R. I, 119-131) including his passport which he testified was in the possession of a travel agency in Naples for a period prior to the time he left Italy for this country (R. I, 126-127). He stated that he had always lived in Apricena, Italy; except for a short period of military service, until his entry here, that the population was approximately 6,000, that in his occupation there as City Clerk and Registrar he had kept a record of all

births and deaths, and that there was no other "Maglio" family residing there and no Nunzia Maria Torelli other than his mother (R. I, 118-119). His testimony was corroborated by the testimony of his cousin, Alfonso Torelli (R. I, 136-140), and by Italian public records attesting that there was record of the birth of only one Paola Maglio in Apricena (R. I, 255).

The government further showed that Paul de Lucia had on bank and insurance records in this country represented that he was born, not in Apricena, but in Naples, Italy on November 14, 1897 (R. I, 163-194). On one of the records he listed his mother's maiden name as Maria Annunziata (R. I, 177). A handwriting expert found the signatures on these records to be those of petitioner (R. I, 229).

A marriage register in a Chicago church showed that Anthony and Mary Annunziata were listed as the parents of Paolo de Lucia of Naples, who was married on January 30, 1927 to Annunziata Gigante (the maiden name of Nancy De Lucia) (see R. I, 161).

In an interview with an F.B.I. agent in 1947, petitioner gave his sisters' names as Emily, Anna, Clementine and Louise (R. I, 143).

The government proved further, by documentary evidence, that one Felice De Lucia was born in Naples, Italy, on November 14, 1897, the son of Antonio and Maria Annunziata (R. II, 11). Felice had four sisters, Emilia, Anna, Clementina and Luisa (R. II, 15). Felice De Lucia was convicted in Italy of voluntary homicide in 1917 (R. II, 18) and again, *in absentia*, in 1924, for voluntary homicide committed in 1920 (R. II, 26).

The District Court in its memorandum, constituting "Findings of Fact and Conclusions of Law", found that petitioner was the Paul De Lucia who used the

name Paul Maglio upon entry here and upon application for naturalization granted in September 1928; that petitioner was not Paul Maglio, that he had falsely assumed this identity to enter this country, and that in representing himself to be Paul Maglio in applying for naturalization, he had committed perjury and a fraud on the court; and that Paul De Lucia was, in truth and fact, Felice De Lucia. The court held that the use by petitioner of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts, vitiated the certificate of citizenship granted to him (R. I, 325-336).

ARGUMENT

At the outset, we point out that the Court of Appeals has reversed petitioner's conviction for contempt in refusing to answer questions asked during a pretrial deposition (Pet. 85-86) and the government has not petitioned for certiorari in that case. Petitioner's argument with respect to the abuse of the Federal Rules of Civil Procedure is, therefore, not properly before this Court.

1. Much of the remainder of petitioner's prolix argument is a series of disjointed attacks on the court's findings of fact and its conclusions of law.[3]

[3] He makes general assertions, for example, that the evidence is insufficient to support the findings and the findings insufficient to support the decree (Pet. 30); that it is impossible to ascertain either the underlying facts upon which the District Court relied or the findings upon which the Court of Appeals affirmed (Pet. 32); that the District Court made immaterial findings which confused the issue (Pet. 35, 36) and findings contrary to facts (Pet. 57); that the Court of Appeals failed to re-examine the findings and improperly added findings of its own (Pet. 51, 54); and that the District Court's conclusions of law were not applicable to his case (Pet. 55, 59).

The record, however, leaves no doubt that the government met the strict burden of proof required in a denaturalization proceeding. The evidence is clear, unequivocal, and convincing. *Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654; *Klapprott* v. *United States*, 335 U.S. 601. The government proved that petitioner is the same Paul De Lucia who, in applying for entry and naturalization, asserted that his true name was Paul Maglio and that he had never been convicted of crime. It established conclusively, by testimony and documentary evidence, that another man is in fact Paul Maglio. The government also established, by petitioner's representations on previous church records, and on bank and insurance records made subsequent to this naturalization, that his birth date, birth place and family history were identical in all respects to that of Felice De Lucia, who was shown to have been convicted of crime. The evidence further showed, in corroborative detail, the opportunity which petitioner had to effect his entry using Paul Maglio's identity and the scheme which he employed in asking, at the time of naturalization, that his name be changed to Paul De Lucia, so that any inconsistencies in identity arising because of his marriage record or otherwise would be obscured.

This evidence was considered by the District Court at length, in an organized and comprehensive fashion with the relevant evidence summarized in support of each specific finding of fact. The court found that petitioner was the "Paul De Lucia" who had falsely assumed the identity of "Paul Maglio" for purposes of entry and naturalization and that petitioner was in fact "Felice De Lucia" who had a criminal record. It held that the assumed name, the concealment of true iden-

tity and "other material facts" were grounds for denaturalization. In the light of its findings and the case law it relied upon to reach its conclusions, it is obvious, as the Court of Appeals observed, that these "other material facts" had reference to petitioner's criminal record.

The Court of Appeals examined the record and found the district court's findings to be fully supported by the evidence and its conclusions of law amply supported by the federal cases.

These conclusions of both courts below are required by logic and law. Both courts pointed out that the use of an assumed name to gain entry into the United States may be grounds for deportation. *Landon* v. *Clarke*, 239 F. 2d 631 (C.A. 1). And, obviously use of an assumed identity in applying for naturalization thwarts the very purpose for which an application is required.

The courts noted further that concealment of a criminal record is grounds for refusing or cancelling naturalization. *United States* v. *Montalbano*, 236 F. 2d 737 (C.A. 3), certiorari denied, 352 U.S. 952; *Corrado* v. *United States*, 227 F. 2d 780 (C.A. 6), certiorari denied, 351 U.S. 925; *United States* v. *Accardo*, 298 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952; *Stevens* v. *United States*, 190 F. 2d 880 (C.A. 7); *United States* v. *Ascher*, 147 F. 2d 541 (C.A. 2), certiorari denied, 325 U.S. 884. Petitioner is not helped at all in this respect by his reliance on *United States* v. *Minerich*, 250 F. 2d 721, where this same circuit held that concealment was not proved by showing the failure of an applicant to volunteer information as to a criminal arrest and conviction occurring some seven

teen days before he was sworn to citizenship and after the preliminary investigation. In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested.

It is clear here that petitioner's naturalization decree was based upon both wilful misrepresentation and concealment of material facts within the plain meaning of the applicable statute. Petitioner's concern with the distinction between "fraud" and "illegal procurement" under the previous statute is immaterial. There is no question here of mere illegality. The government proved wilful misrepresentation and concealment of material facts, or, in the terminology of the prior statute, "fraud".

2. There is therefore no merit to petitioner's assertion that his order of naturalization is *res judicata* even though it was obtained by misrepresentation and concealment of material facts. The very decision which he cites in support of this theory is conclusive authority for the fact that Congress has the power to provide for the revocation of naturalization on the ground of fraud. *Knauer v. United States*, 328 U.S. 654, 673.

3. Petitioner contends that the District Court "erroneously threw into the scales" an inference of guilt against him for having availed himself of the protection of the Fifth Amendment in his pretrial deposition (Pet. 62). The record shows, however, that the court's findings were based strictly upon the documented evidence. This is consistent with its pre-trial ruling (R. I. 51) that the government must meet the positive and affirmative burden of proving its case "beyond a reasonable doubt". This the government did. While noting petitioner's failure to testify at

the pre-trial deposition in its preliminary statement of the case (R. I, 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, and all that the court said as to this was that petitioner's "failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence" (R. I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121.[1] Thus, there was no unjustified reliance on petitioner's failure to testify.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

SEPTEMBER 1958.

[1] This Court there said, of a criminal case, 348 U.S. at p. 138-139: "Once the government has established its case, the defendant remains quiet at his peril."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 264

PAUL DE LUCIA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY

to Government Brief in Opposition

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NOTE

The Summary of Argument has been made to serve also as an index to much of the argument.

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OCTOBER TERM, 1958

No. 264

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY

to Government Brief in Opposition

Reply Brief for the Petitioner

Opinions Below

Since the filing of our Petition there has been published *United States* v. *De Lucia*, 256 F. 2nd 487, being the opinion of the Court of Appeals in the case at bar, *United States* v. *De Lucia*, 256 F. 2nd 493, being the opinion of the Court of Appeals in the related contempt case, and *United States* v. *De Lucia*, 163 F. Supp. 36, the opinion of the District Court in the case at bar.

May it please the Court:

This is a reply brief. In places where we fear that the Brief for the Opposition may have led Your Honors away from the real issues, we do our level best to point the way back to the record. Later in this brief we endeavor to explain why we deemed it necessary to reply and how it happens that so much detail is required. Of course it is possible for Your Honors to determine that certiorari should be granted after reading our petition together with the Government brief.* We have furnished a rather detailed Summary of Argument, herein p. 113, made to serve also as an index, in order that it may not be necessary to study all of this reply, except possibly on points made to appear questionable by that said here by our opponents. We appreciate that this Honorable Court has heavy burdens, at the same time, we have a duty.

The Attorneys for the Government have concluded that our petition should be denied. We proceed to examine the reasons stated.

X.

The record does not support the assertion here by the Government that De Lucia made a positive assertion that he had never been arrested.

We quote from the Brief in Opposition (p. 10):

> "In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested."

Although we touched upon the matter of what may have been said concerning previous arrest in our brief (p. 54), we did not fully argue this point. We did not give the

* In our opening brief, p. 32, we quoted from **Schneiderman**, concerning a reversal for inadequate findings. Please also see **Johnson v. United States**, 256 F. 2nd 849, where the findings were deemed to be deficient that a new trial was held to be necessary.

matter a separate head, for the reason that the District Court shifted away from that portion of the Complaint (Vol. I, p. 5) which charges:

> "8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore, the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

Judge La Buy made no finding which mentioned a previous arrest or the issuance of a certificate of arrival.

The claim that petitioner made false statements concerning arrests has been coupled with the allegation that he used a false name in so many places that we consider the matter of false name under this head as we discuss the matter of arrest. In its opinion (Vol. I, p. 335) *United States v. De Lucia*, 163 F. Supp. 36, 41), the District Court said:

> "(2, 3,) The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him."

After Judge La Buy heard the evidence, the Trial Judge did not find that De Lucia made a positive false assertion that he had never been arrested. The obvious reason for this must have been that Judge La Buy realized that the Government produced no proof as to what De Lucia said, or did not say, to the officials. As we said in our opening brief (p. 48):

> "The evidence leaves a void as to what explanation De Lucia may have made to the officials who issued the papers and passed him into this country."

We respectfully submit that when Your Honors examine the Petition for Naturalization (Exhibit No. 1, Vol. II, p. 1), and find attached thereto a Certificate of Arrival. Such certificate should carry the weight of the positive, uncontradicted testimony of an unimpeached witness, if not more. The certificate, in the absence of any evidence to the contrary, established the fact of legal entry. This one fact precludes the inference made by Judge LaBuy. We quote the rule from *Penna R. Co.* v. *Chamberlain*, 288 U.S. 333, 340:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from the proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." (citing cases)

We quote further from our opening brief (p. 48):

> "The evidence leaves a void as to what explanation De Lucia gave the Examiner Durisch (Vol. I, p. 86). Mr. Durisch did not remember the conversation. He could tell from his marks on the Exhibits that the subject of the use of more than one name had been discussed. The same discussion may have taken place between McKay and De Lucia."

The record is void as to what explanation may have been given at this point. As was said by Judge Levin in *United States* v. *Meli*, 158 F. Supp. 217, 220:

> "'Hypothetical interpretations of nebulous symbols recorded twenty-eight years ago are not to be considered as clear, unequivocal, and convincing evidence which does not leave the issue in doubt.'"

Your Honors will find the answers made by petitioner as filled into blanks after questions put in the Preliminary Form, Exhibit 3 (Vol. I, p. 314; Vol. II, p. 33). We quote:

"24. Have you ever been arrested? No."

Your Honors will note that the questions put just before and immediately after this question specifically pertain to the conduct of the applicant in the United States. On the Face Brief, Exhibit No. 3 (Vol. II, p. 6) in the handwriting of Examiner Durisch there appears a notation as follows, "Arr. no." Mr. Durisch did not remember the incident but he described his usual practice custom and procedure. (Vol. I, p. 103)

The testimony leaves a void as to what explanation De Lucia may have given the Naturalization Judge. The courts below do not make it clear as to when De Lucia was required to explain. If the requirement was to the Immigration Service, there is no evidence that De Lucia did not explain.

The Attorneys for the Government in the case at bar (p. 8) assert that

> "It is established conclusively, by testimony and documentary evidence, that another man is in fact Paul Maglio."

The argument presented to Your Honors is that there can be only one Paul Maglio in this world, or that in some way it would be illegal for anyone else to use the name.*

In *In Re Liebowitz*, 49 F. Supp. 953, in holding that a person may lawfully change his name without legal proceedings the court said, p. 954:

> "And the fact that he took the name of another, even the name of his brother, does not change the rule."

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* We learn from **United States v. Menasche**, 348 U.S. 528, 535 concerning a declaration of intention that "the 1952 Act has rendered such declarations to tally meaningless as far as naturalization proceedings are concerned." In the case at bar, the only paper in evidence from the proceedings, bearing the name Maglio alone, without reference to De Lucia, is the declaration of intention filed in a state court.

A like argument is inferred by the Government Attorneys in opposition here, *i.e.*, there could be only one Felice De Lucia and that that one Felice De Lucia has a criminal record. We again quote from the Government Brief (p. 8):

> "The court found that petitioner was the 'Paul De Lucia' who had falsely assumed the identity of 'Paul Maglio' for purposes of entry and naturalization and that petitioner was in fact 'Felice De Lucia' who had a criminal record."

Judge La Buy did not find that Felice De Lucia, the petitioner, was the same Felice De Lucia who had a criminal record. The Government Attorneys in opposition here have apparently overlooked an important portion of our argument which we repeat from our brief (p. 50):

> "Judge La Buy concluded (Vol. I, p. 333):
>
> > 'The court is of the opinion that the foregoing evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person.'
>
> "Your Honors will please note that Judge La Buy refused to go any further than to find that the De Lucia on trial was in fact Felice De Lucia."

The Court of Appeals said, (p. 79, *United States* v. *De Lucia*, 256 F. 2nd 487, 490):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

The authorities have been collected in 5 C.J.S. § 1460 d. p. 642 to support a rule that the reviewing court is confined to the facts specifically found by the trial court.* But if

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* In **Johnson v. United States**, 256 F. 2nd 849 it was held that it was the duty of the trial court to deal adequately with and to distinguish with clarity what it finds as a fact and what it holds as conclusion of law, and it is not the duty or right of a reviewing court to make independent determinations.

this be treated as an equitable action, the appeal brought up the whole case, and the appellate court might pass on the record as to facts as well as the law. (§ 1462, p. 647) The rules are limited as follows (§ 1564[8] p. 1310:

> "A finding will not be implied where it would be clearly wrong to do so, as where it would be in contradiction of the record, or where the likelihood exists that to do so would thwart the intention of the trial court, * * * or where the court has expressly refused to find the particular fact. Further, the doctrine of implied findings will not be applied as to matters on which the court has made a direct finding, or a finding which precludes the inference, or where the fact is not fairly inferable from the facts found."

Your Honors have announced the rule concerning the duty of this Honorable Court to re-examine the record (Our opening brief, p. 30). In this reply we respectfully contend that there is no competent evidence in the record to support a finding by either court below that petitioner had been convicted of homicides in Italy prior to his coming to this country.

We quote further from our opening brief, p. 50:

> "Petitioner had a perfect right to sit by as the Government introduced a large number of exhibits, (Vol. II, pp. 12 to 43) intended to show that one Felice De Lucia had been convicted in Italy. This evidence at a future time during the trial may have been connected up by proof that the Felice De Lucia named in the foreign documents was in fact petitioner. This connection was not made. So the introduction of the foreign documents meant nothing. We quote from *McCaskill Co. v. United States*, 216 U.S. 504, 517:
>
> > 'In other words, if the testimony was not followed up by other testimony which was necessary to give it effect we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court.'

> "The District Judge in the case at bar must have noticed that the connecting evidence never came. Judge La Buy made no finding based upon the claim asserted by the Government that petitioner and Felice De Lucia named in the foreign documents were the same."

The Court of Appeals in its examination of the findings made by Judge LaBuy to determine what Judge LaBuy had in mind should have limited itself to the record. In the determination of the question, incompetent evidence should not be considered by the reviewing court. (§ 1564 [6] p. 1283). The only evidence to be found in the record concerning any conviction in Italy is to be found in the foreign documents. There is no evidence that the Felice De Lucia named in the foreign documents was in fact petitioner. So the documents should have been disregarded. Our point was also made to appear in our statement of the case as follows (p. 17):

> "At the trial the Government undertook to prove that petitioner had been arrested and convicted of a felony in Italy, before his entry into this country. The proof failed completely. Although the Government introduced a large number of documents (Vol. II, pp. 12-43) intended to show that one Felice De Lucia had been so convicted, no effort was made to prove the law of Italy or the jurisdiction of the foreign courts. No evidence was produced to show that the Felice De Lucia named in these foreign documents was in fact petitioner. Judge La Buy recognized this failure of proof and did not find that the Felice De Lucia named in the documents in fact was petitioner. Judge La Buy did find as a fact that petitioner was Felice De Lucia. This conclusion was reached by circumstantially comparing the proven pedigree of petitioner in this country and comparing it with a parallel pedigree of one Felice De Lucia in Italy, *i.e.*, his birth certificate, his Italian family history. But Judge La Buy did not attempt a further inference upon inference, in order to conclude that the Felice De Lucia

named in the so-called convictions was petitioner. The significance of the refusal of Judge La Buy to take this step was ignored by the Court of Appeals."

Now as we are seeking review in this Honorable Court, we find that the Government Attorneys have ignored the significance of the refusal on the part of the Trial Judge to make these findings.

Our opponents here have ignored the above quoted claim made in our opening brief. Also our opponents ignored the argument we made in our opening brief under the following head (p. 51):

"The Court of Appeals improperly added to the findings of the District Court. In so doing, the Court of Appeals exceeded its appellate jurisdiction. The Court of Appeals is not a fact finding body."

If this were an ordinary civil case the following rules would be applied.

> Where a refusal to find facts involves the weighing of evidence it is as conclusive on appeal as affirmative findings. *Pennok Oil Co. v. Rorana Petroleum Co.*, 289 F. 416; *Nashville Interurban Ry. v. Barnum*, 212 Fed. 634; *Dooley Lumber Co. v. United States*, 63 F. 2d 384.

In Volume 5 A, C.J.S. *Appeal and Error* § 1656, p. 480, the authorities are collected to support the following:

> "When the evidence on which the findings of the trial court are based is undisputed, the question of whether the evidence sustains or justifies the findings is generally regarded as a question of law open to consideration by the appellate court which is not bound by the findings under such circumstances."
>
> "While it is the province of the trial court to draw reasonable inferences from the facts established, the appellate court is not bound by the conclusions or inferences the trial court draws from the facts found." (p. 478)

The portion of our brief apparently overlooked by the Solicitor General is as follows: (p. 30)

> "After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your Honors will re-examine the record to determine if mistakes have been made."

As this re-examination is made by Your Honors, we respectfully submit that Your Honors should keep in mind that the absence of findings on the part of Judge La Buy has significance. The importance of this absence was given no heed by the Court of Appeals. Its meaning was not noticed by our opponents here.

In order for the Court of Appeals and our opponents here to support a finding that petitioner was in fact the Felice De Lucia named in the foreign documents relating to the conviction of one named Felice De Lucia, the foreign documents would have to be relied upon. There is no other evidence, competent or incompetent. Judge La Buy, not having made the finding, it can be assumed that Judge La Buy disregarded the foreign documents as hearsay. The authorities have been collected to support the following rule in 5 C.J.S. § 1564 [5] p. 1270:

> "In general, it will be presumed on appeal, where the case is tried by the court without a jury, that the court considered only proper and competent evidence in making its findings and did not consider other evidence which has been rejected or erroneously admitted, and it will be presumed that such rejected or erroneously admitted evidence, was disregarded. . . . "

As further evidence that the Government Attorneys here in opposition have failed to consider our point, we again quote from our brief (p. 18):

"Every time the courts below found a gap in the proof, the case was regarded as if petitioner were an alien resisting deportation, or an alien making application for citizenship. The burden in the courts below was placed upon petitioner. The courts below ignored the fact that the recitals to be found in the order for citizenship (Vol. II, p. 2) furnished a complete barrier to the theory upon which the revocation decree was founded. The decree was based upon the false assumption that the Naturalization Court depended entirely upon the recommendation of the Designated Examiner. There was no proof to support this theory. There was no proof to show that both the Designated Examiner and the Naturalization Judge did not know all that which was proved in this trial, concerning the qualifications of the petitioner for citizenship. Insofar as the proof in the case at bar shows, the Naturalization Court may very well have known a great deal more about petitioner than did Judge La Buy. The courts below made haphazard findings of fraud with no basis in the evidence and with utter disregard of the limitations placed upon the Government by the allegations to be found in the complaint."

The Government Attorneys, in the case at bar (p. 8) have introduced an argument new to the case as follows:

"The evidence further showed, in corroborative detail, the opportunity which petitioner had to effect his entry using Paul Maglio's identity and the scheme which he employed in asking, at the time of naturalization, that his name be changed to Paul De Lucia, so that any inconsistencies in identity arising because of his marriage record or otherwise would be obscured."

The answer to this is that assuming that petitioner did have trouble in Italy and had succeeded in entry here by use of another name and further concealment, all De Lucia needed to do was to keep quiet about names in the year 1928. De Lucia had filed his declaration of intention

in a state court. (Government Exhibit No. 4, Vol. II, p. 8) Petitioner in 1928 was being put through the usual process. There was no need to mention the name De Lucia. Even an immigrant in his twenties, only fairly cognizant of our language (Vol. I, p. 103), intent upon fraud, or the employment of a "scheme", would know enough to keep quiet about any change of name and obtain his certificate under the name used in the previous papers. Change of name could have been accomplished later, with or without court proceedings, without the risk of prompting the officials to ask a large number of questions. Petitioner could have remained silent as to name and avoided the chance of causing the Naturalization Judge to inquire into family history, or into reasons for the use of more than one name, etc., Is it not more reasonable for Your Honors to conclude, in the absence of any evidence as to what did happen before the Examiners, that the entire matter was fully and truthfully discussed? Your Honors can be certain that there had been some discussion as to name and reason for change, from an examination of Government Exhibit No. 2 (Vol. II, p. 3), being a preliminary questionnaire signed on February 21, 1928. Although Examiner Durisch did not remember the incident (Vol. I, p. 93) he did cause the Face Brief to show that petitioner desired a change of name. We copy from the Face Brief, Exhibit 3, (Vol. II, p. 6) filed April 10, 1928.

Petitioner: Wants: PAUL DE LUCIA

Name MAGLIO, Paul

Your Honors will note from Exhibit 2, (Vol. II, p. 3), that the printed form is in part as follows:

"My full, true and correct name is .....

I have ..... used another name .....

I used that name because .....

So the officials in preparation of the blanks anticipated that different names would often be used. Naturally the officials were interested in the reasons. Petitioner wrote in the last space above,

"I got married on that name."

In the absence of further testimony on the subject, Your Honors know that any official would ask questions to determine how long the name Maglio had been used; how petitioner happened to get married under another name, etc. If all of this was truthfully explained to the satisfaction of the official there is nothing to the charge that a scheme had been employed. In the absence of evidence, Your Honors must judge from circumstances. We submit that even a young immigrant would know that when he answered the above questions as he did concerning the use of more than one name that he invited further inquiry. The argument presented here in opposition for the first time in this case should boomerang. Before Judge La Buy the Government proved by Father Scola, (Vol. I, p. 148) the priest in custody of the church records, that petitioner was married in his church January 30, 1927. Petitioner had filed his Declaration of Intention (Vol. II, p. 8) on January 9, 1925 under the name of Paul Maglio. In this declaration there is no mention of the name De Lucia. There is no evidence that the priest, or anyone else, knew that the Paul De Lucia so married had pending naturalization proceedings under another name. On Feb-

ruary 21, 1928, petitioner filled out the Preliminary Form, Government Exhibit No. 2, (Vol. I, p. 314, Vol. II. p. 3) in which petitioner declared that he had been married under the name Paul De Lucia. There is no evidence that the Examiners knew anything about the name used by Petitioner at the time of marriage until petitioner gave that information. We respectfully submit that if in fact petitioner had been working a scheme he would have said nothing about any Paul De Lucia. It is more reasonable to believe that petitioner had adopted the policy of telling the truth in order to not risk the obtainment of a certificate vulnerable to future attack. Or if he didn't think of the possibility of future attack, he must have thought of the chance that the officials would learn before he went before a judge that he had been using the name De Lucia. Such thought might have prompted him to not attempt to conceal anything about his background. If we are to speculate and guess it never seems to occur to prosecutors that some guesses might be based upon conduct free from fraud, misrepresentations and concealments. Assuming that the proven fact, that petitioner applied for a change of name, may give rise to the inference stated by our opponents and further that the proven fact might also furnish grounds for the inference of proper conduct, we may in such event have a case where two inferences can be made. This Honorable Court stated the rule in *Penna. R. Co.* v. *Chamberlain,* 288 U.S. 333, 339, as follows:

> "We, therefore, have a case belonging to the class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." (citing cases)

Apparently the Government Attorneys have overlooked the following which we quote from our brief (p. 49):

"The Court of Appeals said, we repeat, herein p. 80:

> 'Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.'

"There is no evidence that De Lucia did not use his own name at all relevant times. His name at the time of entry was Paul Maglio. That was his name up to the time it was legally changed by the Naturalization Court. Judge La Buy found that in Italy his name was Felice De Lucia, but without further findings, such fact was immaterial. Here again Your Honors will note that the path of inquiry had been opened. *Cf. In re Iwanenko's Petition*, 145 F. Supp. 838.

"There is no evidence concerning what the Immigration Officials may have learned. What we do know for certain is that the Naturalization Court had before it the conduct of De Lucia during his probationary period and that that Court decided the matter in favor of citizenship.

"Perjury must be false swearing as to a matter material. The name used does not appear to be material. Judge La Buy must have realized that the use of a name alone would have been immaterial, so Judge La Buy coupled such use with a finding that the use of a name prevented investigation into eligibility. There was no prevention or interference shown. The courts below ignored the absence of evidence concerning prevention or interference. Every step taken by De Lucia on his way to citizenship was fully investigated, insofar as is shown by the evidence. Petitioner was eligible for citizenship and was found to have been eligible by the Naturalization Court."

We shall not repeat any more of our argument concerning the use of a name (pp. 46, 57), but in view of the new

argument presented here in the Brief for the Opposition to the effect that petitioner asked for a change of name in order to obscure inconsistencies in identity, we call attention to the deposition of Examiner Jordan (Vol. I, p. 289):

> "Miss Martin (Assistant United States Attorney):
> Q. On the face of Exhibit 2 (here Exhibit 3, Vol. II, p. 6) it says: 'Petitioner wants: Paul De Lucia.' What does that mean?
> Examiner Jordan, A. That he wanted to include in his petition a prayer for a change of name.
> Q. His name being Paul Maglio and he wanted it changed to Paul De Lucia? A. That is right.
> Q. But the practice was to require him to sign in his present name? Q. That's right.
> Q. Not in the name he wanted? A. That's right."

So Your Honors will see that petitioner was compelled to use the name already used on his Declaration of Intention. It follows that if in fact at the time petitioner was examined by Mr. Durisch in 1928 (Vol. I, p. 86) petitioner had explained to Mr. Durisch a good reason for having used two names and had expressed a desire to present his final petition in the name of De Lucia, Mr. Durisch would have informed him of the regulations. The important thing to keep in mind is that all of this could have actually happened. There is nothing in the testimony of Examiners Durisch and Jordan, nothing in the exhibits, nothing in all of the evidence for the Government to show that petitioner did not fully and truthfully explain and tell about his history, status and experiences. It will be noticed that although the United States Attorney presented Examiner Durisch with the Face Brief (Exhibit 3, Vol. II, p. 6) and Mr. Durisch explained in detail many of the entries and markings on the Face Brief (Vol. I, pp. 102, 103, 104) Examiner Durisch said nothing about the name Paul De Lucia or change of name in this connection. We mention this to

show the weakness of testimony from witnesses having no memory of the event. Perhaps if Mr. Durisch had been asked the direct question he would have included in his explanation that the Face Brief indicated that there was some discussion concerning change of name.

The witness Francis Rando, a lawyer attached to the State Department, testified (Vol. I, p. 245) that he was ordered on March 11, 1957 by the head of the Passport Office to consult with the American personnel in Italy to find certain documents. Your Honors will note that the complaint was filed October 10, 1956 (Vol. I, p. 360). The affidavit to show good cause was sworn to on August 9, 1956. It is our respectful contention that the officials filed the complaint first and then started to hunt for the evidence. The prosecutors depended upon proving the Government case by means of pretrial proceedings. But when petitioner, by his answer filed February 7, 1957, (Vol. I, p. 15) indicated that he would claim privilege by virtue of the Fifth Amendment, the prosecutor started to look elsewhere. Also please note that the prosecutor took the deposition of Mrs. Margaret Terrible on March 4, 1957. When it appeared that the witness did not identify petitioner as the Felice De Lucia involved in the homicides, Mr. Rando was given his mission.

Surely, Mr. Rando inquired about the defendant in Italy, that was part of his job. Yet he did not say a word, or was he asked a question about what name was used by the defendant. It is reasonable to assume that Mr. Rando had the information we now obtain from Exhibit 3 (Vol. I, p. 314, Vol. II, p. 3) including the name of the ship, dates, the fact that the ticket was purchased by an Agency in Naples, Italy; the fact that petitioner took the ship from Boulogne, France; the name of the person he was going to see and his destination in this country. Mr. Rando must

have known that the defendant left Europe from France. Is it not reasonable to assume that Mr. Rando learned what name was used by the defendant in France and how long he lived there? In order to embark in France, petitioner was compelled to cross the border from Italy to France. Did not Mr. Rando learn of the visa and how it had been procured. Most likely, the French authorities and the shipowners would not have permitted departure without proper papers. Or the Government should have shown why Mr. Rando did not learn such things, if any reason existed. In the absence of proof Your Honors must conclude that this information was obtained and withheld. The Government is in no position to claim that the information shown to have been given by petitioner was such that petitioner "thwarted" investigation as to his eligibility for United States citizenship. One can not very well thwart an investigation never commenced. There is no evidence that further investigation than that made about 30 years ago was desired or instituted.

There is nothing in the complaint to charge any irregularity in the issuance of a passport or the securing of the proper visa. We must assume that the Department of Labor would not have issued the Certificate of Arrival if the defendant had not passed inspection. There is a presumption of regularity in official action. *Ussi* v. *Folsom*, 254 F. 2nd 842. He could not have passed inspection without a passport containing a visa. We note from the cases involving passports and visas that the American Counsel requires an applicant to fill out a form including information as to previous arrests.

The case at bar might very well be compared to a suit in equity to set aside a judgment based upon newly discovered evidence. In such cases the moving party must show that not only that he failed to discover the new evidence, but he must show further that his failure was not

attributable to his own want of diligence. A defense is not deemed to be newly discovered, if it was, or ought to have been, within the knowledge of the party at the time the original judgment was procured. *Pickford* v. *Talbott*, 225 U.S. 651. In the case at bar the Trial Judge overlooked the duty of the Government to prove such elements. The theory of the Government was that the officials did not know of a previous arrest, that if the officials had known of any previous arrest such fact would have been shown and the result would have been denial of citizenship. Upon this theory, the plaintiff expected Judge La Buy to believe that the arrest and criminal record was discovered for the first time nearly 30 years after the granting of citizenship. We submit that the Government should have proved something about when and how this new evidence was discovered, (if it was new) in order that Judge La Buy could find that there had been no lack of diligence, that the evidence was not known at the time of the judgment. The Government should have proved circumstances to prove that it was not reasonable to find that the new evidence ought to have been known at the time of Naturalization. If the Trial Court had required this burden to be met, the Government would have been required, among other things to prove by Mr. Rando, either that there was no record in the office of the American Counsel, or that the record did not contradict the theory of the Government. The failure to examine Mr. Rando on this subject should have prompted Judge La Buy to infer that the officials nearly 30 years ago did have knowledge of the background and experiences of petitioner, assuming for the sake of argument that petitioner had been convicted of crime in Italy. The record in the office of the American Counsel should show either one of the following:

(a) Petitioner obtained his visa with no mention of any conviction or by falsehoods and the Counsel ap-

proved the issuance of the visa in ignorance of the facts.

(b) Petitioner obtained his visa after a full disclosure of the conviction including the surrounding circumstances and the Counsel approved the issuance of the visa in full knowledge of the facts.

There is the possibility that petitioner had no arrest or conviction, but for the sake of argument, we are assuming that petitioner is the same person named in the foreign documents. After the evidence was closed before Judge La Buy, it became too late for the United States Attorney to claim that there was no record, or that the file had been lost or destroyed. There was no proof along that line. Judge La Buy said nothing about this failure of proof. Whenever Judge La Buy noticed a gap in the chain of circumstances intended to establish the case for the Government, Judge La Buy assumed that the burden was on De Lucia.

If Mr. Durisch asked questions to bring forth the information that the defendant had used the name Maglio in Italy and in France and had become known in certain quarters by that name, no doubt all Mr. Durisch would have done would be to check the face brief as described. Mr. Durisch was not asked nor did he say that such conversation did not take place.

We have no evidence at all as to what may have happened before the Designated Examiner. The law required the defendant to wait at least 90 days after he filed his Petition for Naturalization before he went before the Court. If the usual custom was followed, Mr. McKay examined petitioner on the same day the petition was filed (Vol. I, p. 96). The record is silent as to what the Designated Examiner McKay did in those 90 days. If he made a report, the Government has it and failed to produce it. If he made no report, the Government failed to prove that fact.

When Your Honors study the deposition it will be found that Mr. Jordan recognized a J as his handwriting on the Face Brief (Exhibit 3, Vol. II, p. 6) and that indicated that he had taken the defendant to court. That is all he knew. He did not remember the defendant or the occasion. He told about the usual custom and the prosecutor asks us to infer without evidence that there was nothing in the way of proceedings before the judge. In the absence of evidence, withheld by the plaintiff, Your Honors will presume that the judge did all that was required and that he was not deceived.

After the evidence in the case at bar was closed, the parties submitted briefs to the Trial Judge. Petitioner made a point of the fact that Designated Examiner McKay had not been produced or accounted for. Judge La Buy took notice from a reply brief of the death of Examiner McKay. (Vol. I, p. 335)

The prosecution not only failed to prove the death of Mr. McKay but they failed to make any attempt to prove by anyone else what, if anything, took place before him. Nor was any attempt made to explain why such additional evidence could not be produced.

In *Penn-Texas Corporation v. Morse*, 242 F. 2nd 243, after trial plaintiffs failed to establish any right to equitable relief and the trial judge dismissed the complaint on the merits for want of equity. In affirming Judge Finnegan said, p. 248:

> "These plaintiffs cannot select what they will reveal and then expect equitable relief. Strategy has its uses but full disclosure would have been more suitable before the chancellor below."

Although Mr. Jordan said that the Designated Examiner usually examines the applicant and his witnesses in the presence of each other (Vol. I, p. 292) and Mr. Fish (Vol. I, p. 74) is shown to have been one of the wit-

nesses, not one question was asked Mr. Fish seeking to show what happened before the Designated Examiner. The prosecution dropped the matter, preferring to rely upon speculation and inference that the Designated Examiner asked certain questions and received false answers. There is nothing on the face brief or any other paper in evidence to show what may have happened when Mr. McKay took over. The Examiners Durisch and Jordan told of the custom and it appears that when the Preliminary Examiner finished he made use of the applicant as a messenger to deliver the papers to the Clerk of the Naturalization Court. The witnesses were sent along and if the custom had been followed, all were required to sign and swear to the petition in the presence of the Clerk and each other. Mr. Fish would not say that he saw petitioner sign. An examination of the testimony of Mr. Fish will show that even if a custom existed, as described by Examiner Durisch and Jordan, that custom was not followed in the matter of the naturalization of petitioner. Mr. Fish was not even asked if he was required to swear to the affidavit signed by him. Mr. Fish at the time of signing the affidavit, was a newspaperman. It is common knowledge that the rules are often broken to accommodate the representatives of the press.

When Your Honors examine the Petition for Naturalization (Vol. I, p. 323) it will be seen that Mr. Fish signed an affidavit naming the defendant as Paul Maglio. Yet Judge La Buy found, contrary to the written record, that Mr. Fish did not know that the defendant used the name Paul Magio. We quote (Vol. I, p. 326):

> "To this end the government's evidence consists of the testimony of Michael J. Fish, who identified this defendant as the same person for whom he appeared and signed as a witness during the naturalization hearings preceding the granting of the certificate. Mr.

Fish testified that at that time he was employed as a staff photographer for the Chicago Tribune; that at that time Paul De Lucia was a restaurant manager; and that he did not know the defendant used the name Paul Maglio."

It is very possible that the finding made by Judge La Buy is absolutely correct and Mr. Fish did not know that petitioner ever used the name Paul Maglio. Mr. Fish may have signed the affidavit (Vol. I, p. 323, Vol. II, p. 1)

"..... that he has personally known Paul Maglio, the petitioner above mentioned ....."

without reading it. Also Mr. Fish may have signed with no one else present and without meeting the Designated Examiner. We quote from the testimony (Vol. I, p. 75)

"Mr. Bickley, Assistant United States Attorney: Q. Did you have occasion to sign the document as a witness, sir?

Mr. Fish: A. Yes, sir.

Q. Who else signed as a witness, if you know?

A. Well, there is a Frank Meo here * * *

Your Honors will note that Mr. Fish evaded answering the question. The record shows that he was being shown the petition for naturalization. All he answered was that he observed the name Frank Meo on it.

Q. Who signed as petitioner to that document? * * * I am referring now to Government's Exhibit 1 for identification. This is a petition for naturalization and it is signed by an applicant.

The Witness: You mean, did I actually see him sign it? * * * No, I do not remember seeing him sign it."

We submit that that is another evasive answer. We quote further:

"Q. Do you know who signed that document.
Mr. Stewart: I object.
The Court: Well, if he did not see it, I do not know how he would know it."

At this point the prosecutor dropped the subject, leaving it stand that Mr. Fish did not know of his own knowledge who signed the petition as applicant. He was not asked if he saw the other witness sign. He was not interrogated as to whether or not he was asked any questions by an Immigration Official. He was not asked whether or not he ever heard any official question petitioner. He was not asked if he was either excused from going to court, or if he did go to court.

When the record is examined, the finding above made by Judge La Buy from which we quote should be given no weight:

"..... and did not know the defendant used the name Paul Maglio."

Judge La Buy might just as well have found that Mr. Fish knew nothing about the case other than the fact that he was able to identify his signature on an affidavit. The fact that Mr. Fish did not know that petitioner had used the name Paul Maglio should have been given no weight in the determination of the issues.

Mr. Fish was not asked nor did he say anything about having been examined by Mr. Durisch. It is just as reasonable to say that he never went to the Immigration Department office as to guess that he was there. This shows how unreliable proof of custom can be if we did not know that regular procedures are not always employed. The circumstances proven, without dispute, should have impelled Judge La Buy to find as a fact in this case that the usual and customary proceeding was not followed.

It is reasonable to assume that court records were made in addition to those introduced into evidence before Judge La Buy, as for instance, clerk's records and notations; judges minutes. Mr. Durisch in describing the customary procedure followed in those cases where the judge acted solely upon the recommendation of the Designated Examiner said, (Vol. I, p. 97):

> "Well, then, when that period of time was up, the petitioner was notified to appear with the other persons who were the same kind of cases at a final hearing in one of the courtrooms. The judge would be informed of the recommendation of the case, and upon accepting a grant recommendation, a person would be given the oath of allegiance and the court would sign an order covering the list of cases for that particular day, and the Clerk of the Court could then issue a Certificate of Naturalization to the newly naturalized persons."

So Your Honors will note that if such procedure had been followed, the order admitting petitioner would have been based upon a list signed by the judge. No such list was produced. Its absence was not accounted for. In its absence we assume that the name of petitioner did not appear on any such list. Further that the judge considered the application and further testimony as described in the order. (Vol. II, p. 2) That petitioner was not admitted solely on the recommendation of the Designated Examiner. There is no evidence that the Designated Examiner said anything, good or bad, about petitioner. There is no evidence that the Face Brief or the Preliminary Form was ever exhibited to the judge, or called to the attention of the Court. Such evidence and lack of proof destroys that thought to be a foundation for the decree.

If other applicants were admitted to citizenship they could be expected to remember the event. No attempt was made to make proof along such line, no effort

was made to show Judge La Buy why such evidence was not forthcoming. The failure on the part of the prosecutor to prepare his case properly for trial might be explained when we observe from the record that the United States Attorney counted on proving his case by virtue of pre-trial proceedings. Then when the prosecutor found that the Trial Judge was of the opinion that De Lucia had no constitutional right to refuse to answer oral interrogatories, the prosecutor concluded that no evidence further than that produced was required. Such theory is easier on the prosecutor than to have Your Honors conclude that the prosecutor examined the records, determined that they would contradict the theory of the Government and withheld them. The gaps are there, no matter how they happened to have been left.

We again quote from Judge La Buy (Vol. I, p. 328):

> "The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization."

After further review, Judge La Buy said (Vol. I, p. 329):

> "The court is of the opinion that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court."

There was no proof of perjury and there was no evidence to show fraud on the court.

It is obvious that the defendant used the name of Paul Maglio when he entered this country. Or to put it another way, petitioner was named Paul Maglio when he entered.

In so far as the evidence reveals the facts, a passport and a visa were granted petitioner and the officials in charge of the grant intended petitioner to have them. They were issued after regular procedures and accepted as genuine by those having to decide whether or not petitioner should enter.

We again copy from the complaint (Vol. I, p. 5):

> "(V) That in truth and in fact the defendant's entry into the United States at New York City on August 12, 1920, was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.
>
> 7. That the said defendant, Paul De Lucia formerly known as Felice De Lucia, assumed the identity of Paul Maglio, in order to conceal his true identity, to hide from the immigration officers at the time of his arrival, * * * the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy, and that he had fled from Italy in order to escape arrest for a subsequent prosecution.
>
> 8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

Your Honors now know that a proper arrival Certificate was duly issued in regular form. The charge made in V above about not having a Certificate was unfounded. The pleader must have known that it could never be proved and further that it would be contradicted the moment the Government placed the Petition for Naturalization into evidence. This is one of the reasons we say the prosecutor filed a complaint known by him to contain false and un-

founded allegations. It can be assumed that a copy of the Petition for Naturalization with the Certificate of Arrival was in the file of the prosecutor. Also in the file when the affidavit to show cause was made. This affidavit includes the false statement that there was not attached a Certificate of Arrival. (Vol. I, p. 9) It can be inferred that the above allegation was placed in the complaint in anticipation of a motion to dismiss. Other grounds for cancellation may have presented difficulties in pleading. But on a motion to dismiss, no defendant could afford to admit for the purpose of the motion that he had no Certificate of Arrival. Judge Finnegan, in *United States* v. *Minnerich*, 250 F. 2nd 721, 726 said concerning an affidavit of good cause;

> "These affidavits are the means by which courts can ascertain whether the United States Attorney's conclusion about instituting denaturalization proceedings dictated what the reasoning ought to be, in contradistinction from an affidavit showing the basis for reasoning which determined what his conclusion in that regard shall be."

Judge Finnegan also said, p. 725:

> "From such an affidavit an experienced judge should be able to detect a United States Attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard."

We respectfully submit that when it appears that the courts below fail, to detect, or detect and do nothing about it, this Honorable Court is duty bound to enforce the safeguard, for the protection of naturalized citizens against reckless categorization, non critical selection of candidates and affidavits known to have been false.

We have gone into detail, including the above quotation from the complaint as we wish to bring before Your Honors the manner in which the pleader alleged that the false representations were material. Also the effect said to have been achieved by false representations. Your Honors will note that in the complaint the alleged false representations were related to the entry. There was no evidence of any representations, true or false, at the time of entry. The Attorneys for the Government here did not see fit to answer our argument under the following heads (pp. 59-31):

> **The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.**
>
> **In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.**

The argument made by the Government gives no heed to the above points and therefore could lead Your Honors away from the issues. In this reply we seek to bring the above contentions back into the case.

We now quote from Mr. Jordan (Vol. I, p. 273) to show that there was absolutely no connection between what defendant may have written or said and the issuance of the Certificate of Arrival. The Certificate of Arrival was issued before the defendant filed anything in the case.

> "Examiner Jordan: A. The applicant's Declaration of Intention would accompany this form when the applicant submitted it and the Declaration of Intention and this form would be assembled with the Certificate of Arrival produced by the Naturalization Service.

Miss Martin, Assistant United States Attorney: Q. When you refer to a Certificate of Arrival, where would that form be created? When would that first originate?

A. At that particular time I believe those certificates of arrival were procured before the Declaration of Intention was filed and were kept in the office with the Naturalization Service in the District field headquarters."

Judge La Buy said further (Vol. I, p. 333):

"The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States (Citing cases)

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship."

There is no evidence that petitioner did not explain the use of the two names, first to the Examiners and then to the Naturalization Court. The circumstances proved indicate that explanations were in fact made. The full explanation is not before Your Honors partly because Examiner Durisch could not remember this defendant or the conversation. (Vol. I, p. 93) As we have pointed out, Examiner Durisch was not even asked about what conversation may have been had with him about the name. It is a good guess that there was some discussion for the reason that Mr. Durisch caused to be typed on the Face Brief (Exhibit No. 3, Vol. II, p. 6) "Wants: PAUL DE LUCIA." There is no such request written on the Preliminary Form (Exhibit 2, Vol. II, p. 3) No evidence suggests that any investigation was thwarted. The examiners

made all of the investigation thought necessary to determine if defendant possessed the qualifications. The evidence shows he did have those qualifications. At any rate, the Naturalization Court found that petitioner was qualified. There is no evidence that he was not, even assuming that he had been arrested and convicted more than five years previously in Italy.

Your Honors have already noticed that Judge La Buy included:

> "unless it is shown that this name had been one assumed and used prior to entry into the United States."

We ask ..... shown to whom? The burden was on the Government to show the negative. At any rate, the defendant passed inspection and was admitted in 1920. In the face of his Certificate of Arrival and the judgment it is too late to question the legality of his arrival. Furthermore, as we have said, no evidence was introduced from which an illegal entry can be determined.*

Your Honors will note from *United States* v. *Grabina*, 119 F. 2d 863 that the defendant obtained his papers under the name of Ginsberg. Judge Swan said, p. 864:

> "Anyone checking his entry must have known that he entered as Josek Grabina."

So the change of name did not in fact deceive the officials.

In view of the record showing that the Naturalization Court heard witnesses in open court (Vol. II, p. 2), the fact that the petition requested a change of name and the statutory requirement that good cause must be shown, before a name change will be allowed, it is fair to assume that the Naturalization Judge satisfied himself as to the reason petitioner made his original application in the name

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* If this decree could, under the evidence, be based upon illegal entry a point of law suggested in **Lehmann v. Carson**, 353 U.S. 685 and **United States v. Menasche**, 348 U.S. 528, might arise. Petitioner may have acquired a status saved by Section 405(a) of the 1952 Act, 66 Stat. 163, 8 U.S.C. § 1101 **et. seq.**

of Maglio. There can be no doubt but what the Judge inquired as to the true name and ascertained enough of the facts to make an intelligent judgment. If in fact the Naturalization Judge ordered the change of name without requiring any explanation from the defendant there had been no representations, true or false. If the Naturalization Court acted upon the Petition alone, all that contained was a prayer. (Vol. I, p. 322) The order of Court should put an end to the matter of the name.

Your Honors will notice from the photostatic copy of the Petition for Naturalization (Vol. II, p. 1), that just above the signature Paul Maglio and added by typewriter there appears the following:

> "..... and that his name be changed to Paul De Lucia"

This petition was prepared under the supervision of the officials by a clerk in the office of the Service. (Vol. I, p. 96) It is fair to assume that before this request for change of name was included there had been some discussion. On the reverse side of the Certificate of Naturalization there appears the following:

> "By order of court, name changed from Paul Maglio."

We ask, is not that a judicial finding that the name before the change was Paul Maglio?

Permit us to review the cases cited as authority for that quoted above by Judge La Buy concerning the use of an assumed name. Your Honors will note that the Court of Appeals chose to cite (p. 80, 256 F. 2nd 487, 490) only two of the following cases, *i.e.*, *Landon* and *Schlotfeldt*. The Attorneys for the Government in this Honorable Court reduced the number to one, *i.e.*, *Landon* (p. 9). We return to all of those cited by Judge La Buy, for after all, if the District Court failed to distinguish cases, such failure was bound to have had an effect when it came to the making of findings.

United States v. Goldstein, 30 F. Supp. 771.

It appears that the defendant, in *Goldstein*, after his arrival and after filing his application for citizenship, admitted that his entry was illegal because he had entered under a passport issued illegally. On the day his petition was filed, Goldstein told the Examiner his right name and said he used another name because it was the maiden name of his mother. Evidently that explanation was accepted as the defendant was admitted to citizenship. Five years later the defendant was examined. We quote from Judge Campbell, p. 772:

> "On May 11th, 1936, an examination was conducted by Immigrant Inspector Marcus Rebach, in the presence of Sussana Kramer, stenotypist, and respondent therein stated that his real name was Isac Goldstein, and not Israel Grun, and that he had used the name of Israel Grun for the purposes of evading military service in Romania. On the said examination respondent also admitted that Israel Grun was his cousin, two years his junior, and that he, respondent, had obtained his passport to the United States, by making false declarations as to his name and age, and also that the statement in the declaration of intention, as to his name, was untrue."

As a matter of law applied to the facts, Judge Campbell held, p. 773:

> "The term 'residence' as used in this Act, is 'legal residence' and anyone who enters this country illegally cannot thereby acquire a legal residence as a basis for application for citizenship.
>
> "The use of a fraudulently procured passport to gain admission to this country is unlawful."

Further on in the opinion, Judge Campbell stated that, p. 773:

"—what the respondent offered was a passport, not issued to him, but to his cousin, which act was a wilfully fraudulent one, and rendered the respondent ineligible for citizenship—"

We submit that the *Goldstein* case is easily distinguished from the case at bar. Your Honors will note charges in the complaint in *Goldstein*, p. 772, not to be found in the case at bar, *i.e.*

> (1) respondent never established a lawful residence in the United States, in that he entered this country illegally and pursuant to a fraudulently procured passport, * * * (3) he had not behaved as a person of good moral character during the five-year period next preceding the filing of the said petition for citizenship.

The District Judge found, p. 773, that:

> "* * * what the respondent offered was a passport, not issued to him, but to his cousin * * *"

The authorities are collected in 5 C. J. S. § 1564 (8), p. 1311 to support the following:

> "It is not presumed that the judge found facts sufficient to support the judgment entered where it is apparent that he acted under an erroneous conception of the applicable law."

See also *Billington* v. *Prudential Ins. Co.*, 254 F. 2nd 428.

United States v. Shapiro, 43 F. Supp. 928.

The defendant in the old country paid money for a passport and a quota immigration visa issued to another. She knew at the time she received the passport and visa that they were not issued in her name, or to her. The District Court stated these facts with some detail and there was no question but what such facts had been proved. The Court concluded from the proof that there had been no lawful entry. It followed that without lawful entry, the defendant had not established a legal residence. Citizen-

ship was revoked. In the case at bar, insofar as the evidence reveals, the officials of Italy gave petitioner his passport and the American Counsel issued a visa. They intended that he should have these papers in whatever name issued. *Cf. Fink* v. *Reimer*, 96 F. 2nd 217.

United States v. Perez, 29 F. Supp. 888.

Here the defendant stipulated that he entered on a passport issued to his brother. It appears that defendant was more concerned in securing a recommendation from the court than in a contest on the merits. The District Judge paved the way for a new petition. No authorities are cited.

United States v. Marino, 27 F. Supp. 155.

The defendant entered on a passport secured by a false statement that defendant had been here before. This was done in order to secure the benefit of certain legislation. It appears that the defendant is illiterate and not eligible for citizenship. His main defense was that the United States was barred by laches.

The fact that this alien although illiterate could have gone through the process should cause Your Honors to suspect that the alleged usual and customary procedure described by Mr. Durisch was not always followed. Mr. Durisch (Vol. I, p. 95), said that under the usual practice an applicant was requested to sign his name for the purpose of determining if he could write. That the applicant was given an examination in order that the Examiner could determine his knowledge of English and Government, and knowledge of the Constitution. A grade was given followed by the initials of the Examiner. An illiterate immigrant could not pass such an examination.

Fink v. Reimer, 96 F. 2d 217.

See also same case in 16 F. Supp. 487. It appears that in previous litigation the citizenship of this defendant was cancelled and he pleaded guilty to an indictment charging him with procuring naturalization illegally. The correctness of the denaturalization or the legality of the jail sentence was not before the Court in 16 F. Supp. 487. Here we have a habeas corpus proceeding intended to stop deportation. The defendant had the status of an alien and the burden was on him to show legal entry.

The effect of the denaturalization decree was to not only put the defendant back into the status of an alien, but to be regarded as having never obtained citizenship. So this amounts to an alien deportation case.

As part of the return defendant's admissions made to the Examiner reveal the whole story of the fraud perpetrated by him in obtaining his immigration visa. He pretended to be one Apfelroth who had previously started proceedings to obtain a preference because of a son living here. Judge Hand said, p. 218:

> "An alien who enters under a passport and visa fraudulently obtained is 'not entitled * * * to enter' under the act of 1924. It is true that to be admitted as a quota immigrant Fink only had to have 'an unexpired immigration visa,' section 13 (a) (1) of the Quota Act of 1924, 8 U.S.C.A. § 213 (a) (1), and that he did have one; both passport and visa were in fact issued to him, that is, to the man who appeared before the officials though under the name, Apfelroth. It is hardly true, therefore, to say that the documents were 'no' passport and 'no' visa; they were not for instance like passports issued to another person, whom the bearer pretends to be. Moreover, a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue the visa. *United States ex rel. Iorio*

> v. *Day*, 34 F. 2d 920; *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263; *McCandless* v. *United States ex rel. Murphy*, 47 F. 2d 1072, appears to be to the contrary. In any case the fraud here was essential to success; Apfelroth could get a preference visa, Fink could not."

Need we remind Your Honors again that no question of passport, visa or entry was involved in the case at bar.* The judgment of the Naturalization Court settled these matters for all time and therefore the cited cases take us way off the track.

It appears that Judge La Buy failed to notice the distinction between cases involving aliens and those relating to naturalized citizens. This may explain why the Court of Appeals dropped these cases. If so, we respectfully submit that that Honorable Court should not have approved the law findings made by Judge La Buy. The findings of fact made by Judge La Buy concerning the use of a name are entitled to no weight because of the misconception of the law evidenced by the citation of these cases.

Landon v. Clarke, 239 F. 2d 631.

Same case 139 F. Supp. 113. This was a habeas corpus proceeding. Defendant about to be deported after an administrative hearing took out the writ. She had not applied for citizenship. The officials got after her within six months of her entry. The trial judge discharged her and the Court of Appeals reversed. The case is clearly not in point and it will serve no good purpose to go into detail.

The Attorneys for the Government here in the case at bar cite the *Landon* case as follows:

> "The Court of Appeals examined the record and found the district court's findings to be fully sup-

* Unlawful entry is a crime involving moral turpitude. **De Bernardo v. Rogers**, 254 F. 2nd 81. Haphazard findings with no basis in the evidence should be disregarded.

ported by the evidence and its conclusions of law amply supported by the federal cases.

These conclusions of both courts below are required by logic and law. Both courts pointed out that the use of an assumed name to gain entry into the United States may be grounds for deportation. *Landon* v. *Clarke*, 239 F. 2nd 631 (C.A. 1)."

Our opponents neglect to point out that *Landon* is authority for the deportation of an alien who made use of an assumed name to gain entry. Surely Your Honors know the difference between an alien found here with no right to stay in this country and a naturalized citizen. The Government seeks to not only regard the naturalized citizen as a second class citizen, it has succeeded in having the courts below regard petitioner as if he were an alien. Instead of making any effort to answer the argument made in our opening brief, our opponents repeat the errors of the courts below. It can not be that they expect that Your Honors too will be unable to distinguish between cases involving aliens and those such as the one at bar. Surely our opponents can not hope that Your Honors will regard petitioner as having no further rights than those of an alien. We trust that Your Honors will see fit to express a contrary view.

United States ex rel. Liebowitz v. Schlotfeldt, 94 F. 2d 263.

Judge La Buy, after citing the above cases on the question of name used has asked the reader to compare this case. This was a habeas corpus proceeding. The District Court discharged the alien held on a deportation warrant. In affirming, Judge Major said, p. 265:

"We reach the conclusion under the circumstances presented, that no fraud was intended, and, as a matter of fact, none was perpetrated on this government by appellee in obtaining his immigration visa.

Whether the use of such name and age enabled him to escape military service in some other country, we are not directly concerned. He was within the

quota provision, could have obtained his visa by stating his correct name and age, and otherwise met the prescribed requirement to enable him to effect a legal entry. Therefore, the misrepresentation complained of were irrelevant and do not constitute grounds for deportation."

In *In Re Liebowitz*, 49 F. Supp 953 where Judge Holly admitted this alien to citizenship the District Court said, p. 954:

> "The Circuit Court of Appeals held that the alleged false statement made by him as to his name to obtain entry to the country was not sufficient grounds for deportation and I am of the opinion that the use by him of the name Feive Leibowitz is not a sufficient reason for denial of naturalization.
>
> (2) As a matter of fact his name at the time of his entry into the United States was Feive Leibowitz. At common law and in the absence of statutory restriction an individual may lawfully change his name without resort to any legal proceeding and for all purposes the name thus assumed will constitute his legal name just as though given at birth. *Reinken* v. *Reinken*, 351 Ill. 409-413; 184 N.E. 639; *United States* v. *McKay*, D.C. 2 F. 2d 257; *Christianson* v. *King County*, D.C. 196 F. 791. And the fact that he took the name of another living person, even the name of his brother, it seems to me, does not change the rule."

The case at bar and the cited case would be much alike if the Government now filed a denaturalization case against Liebowitz based upon the same objection considered by Judge Holly. Your Honors know of course that the next judge would lack jurisdiction to try the objection over again. After all a judgment does settle some things.

The Court of Appeals cited two of the cases cited as above by Judge La Buy as follows: (p. 80, 256 F. 2nd 487,49)

"(4) The use by an alien of an assumed name to gain entry into the United States, is ground for deportation, *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263."

The Court of Appeals did not indicate the manner in which the law applicable to aliens had anything to do with this case. As Your Honors know an alien must satisfactorily explain. The citizen need not. Where the burden of proof lies is important. This was often lost sight of in the courts below.

United States ex rel. Volpe v. Smith, 62 F. 2d 808, 812.

Judge Major in the *Schlotfeldt* case said enough about the *Volpe* case to show that it is not in point in the case at bar.

We repeat the last two sentences from the above quoted portion of the opinion of the District Court (Vol. I, p. 337):

"In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship."

Judge La Buy, without any evidence to support his conclusion, assumes that the use of the name Maglio was unexplained.

How anyone can say it was unexplained in the face of this record is difficult to understand. Your Honors know that it was necessary to explain to the Naturalization Judge. The Immigration Statute, Title 8 § 1447, provides for the change of name in the discretion of the court upon the bona fide prayer of the petitioner. As we have said a Naturalization Judge would obtain the facts before the exercise of discretion and would inquire to see if the prayer was bona fide.

It is certain that any applicant for citizenship who might include a request for change of name would expect to be questioned on the subject.

We learn from cases such as *Landon* v. *Clarke*, 139 F. Supp. 113, that our consular officers require certain information before a visa is issued. Judge Wyzanski said concerning an application for a visa:

> "(1) As the above authorities indicate, it was apparently well settled by tribunals of distinction that misstatements in the application, even if knowingly made, were not to be regarded as grounds for deportation in the absence of a showing that the misstatements were prejudicial to the Government in some other sense than that they hampered a complete and full investigation.
>
> If the concealed fact were disgraceful or embarrassing or likely to involve some local difficulty in the country or origin, the Courts tended to treat such concealment as no ground for deportation if it were clear that had the concealed fact been disclosed the attitude of the American admitting authority would have been the same. The reason for this attitude is quite obvious. Many persons called upon to disclose their full life, and not certain whether they will be admitted to the United States, may at the time they are appearing before the Consul keep back events or facts which will or might get them into trouble with their relatives or the authorities in the country of their origin. Unless the concealment does real harm to the United States, it is a very harsh rule that provides for the deportation of the alien long after he has been admitted on the ground that he did not make this disclosure. To sanction deportation under these conditions is often (as it may have been in this case) a spur to a malice, envy, spite, or worse motive of someone in the country of origin, who has no other purpose than to cause discomfort to the person newly admitted to the United States and who is not in the least solicitous about the

welfare of this country, but only seeks to impose suffering on the recently admitted immigrant."

We submit that fact that Judge Wyzanski was reversed does not take away the force of the argument suggested by the above quotation.

We respectfully request Your Honors to assume that from the time of arrival up to the time of the issuance of the Certificate of Naturalization, petitioner fully complied with the law, answered all questions truthfully, concealed nothing and made no false representations to any one connected with the Immigration Service. That he appeared before the Naturalization Judge where his petition and affidavits in support thereof, were considered together with testimony taken in open court (Vol. II, p. 2) and he was admitted to citizenship. There is not one scintilla of evidence to show that our supposed state of facts did not exist. On the other hand, there are many facts and circumstances to show that that is probably what happened. The Government proved the case for petitioner, while attempting to establish proof for the plaintiff.

XI.

The Examiners who testified did not remember petitioner or the transaction. The Government attempted to prove a false answer as to arrests by certain markings on the papers coupled with proof of custom. This proof was insufficient to warrant the inference drawn here by the Attorneys for the Government.

As Your Honors study the record, we respectfully suggest the reading of the testimony of Examiner Durisch (Vol. I, p. 86, In narrative form, Vol. I, p. 344), the deposition of Examiner Jordan (Vol. I, p. 262), the examination of Plaintiff's Exhibit No. 3 (Vol. I, p. 314, Vol. II, p.

3) and Plaintiff's Exhibit No. 2 (Vol. I, p. 313, Designated as Exhibit No. 3 in Vol. II, p. 6) being what was termed a Face Brief. Then if Your Honors will examine the footnote to the opinion of the Court of Appeals (Our brief, p. 82, *United States* v. *De Lucia*, 256 F. 2nd 487, 492), one of the fatal gaps in the case for the Government will be observed and understood. The Court of Appeals failed to perceive that in the total absence of testimony concerning what was said by petitioner at the time he was examined, Judge La Buy had no way of knowing what petitioner understood by the question concerning an arrest. If the question referred only to an arrest in this country, or only to his probationary period, his answer was truthful, even assuming that he had had trouble in Italy. If, assuming he had trouble in Italy, and petitioner explained the same to the Examiner and the Examiner considered him eligible, a check mark would have been the result. There is no proof as to what petitioner understood by the questions and absolutely no proof that he did not satisfactorily and truthfully explain any arrest which may have taken place. After Your Honors study the record we are certain that the following which we quote from the above mentioned footnote consists of a misleading half truth:

> "As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant and that the latter's oral answer agreed with that on the preliminary form."

We quote from the testimony of Examiner Durisch (Vol. I, p. 100):

"Mr. Bickley (Assistant United States Attorney): Q. All right sir. Now dropping down to the next line, the statement, 'I was born on,' it is printed, opposite that appears a double check-mark. What reason, if any, was there for putting a double check-mark, black ink check-mark at that particular spot?

Examiner Durisch: A. The applicant was asked, 'Where were you born?' and the answer he gave agreed with the written application.

Q. What answer did he give in this particular case, sir? A. I do not personally remember. * * *

Q. I take it, sir, from each one of your answers as we go down this list where a double check-mark appears in black ink that would indicate to you that you asked the question orally of the applicant and he gave his answer, is that correct? A. Yes.

Q. And the answer that he gave you orally was the same as appeared on that written application, is that correct? A. Yes. We were looking for discrepancies and where the answer would agree with the application and where the same item would appear, the answer had to agree with the Declaration of Intention, or explanation of any discrepancies were needed."

So it follows that if explanations were needed and given to the satisfaction of the examiner the same check mark might result.

This qualification concerning the meaning of the check marks was overlooked by the Court of Appeals.

Although we demonstrate from the record that the courts below were mistaken concerning the value of the evidence given by the Examiners Dursich and Jordan, we respectfully request Your Honors to not lose sight of our contention that the preliminary proceedings, leading up to naturalization, lost significance, by reason of the judgment of the Naturalization Court. The Government proceeded on the charge that misrepresentations and concealments caused

the officials to recommend citizenship and the Naturalization Judge relied upon that recommendation. The judgment of the Naturalization Court (Vol. II, p. 2) destroyed this theory. The Courts below ignored this failure of proof. Judge Finnegan said in *United States* v. *Minnerich*, 250 F. 2nd 721, 732:

> "From all we can find in this record the judge relied on the examiners' report and not upon the petitioner."

In the case at bar we submit that Judge La Buy should have found, or the Court of Appeals should have noticed, that the Naturalization Court did not rely upon any examiners' report, insofar as was shown by the evidence.

We quote from the deposition of Examiner Jordan (Vol. I, p. 278):

> "Miss Martin (Assistant United States Attorney): Q. Referring again to the point in the procedure where the Preliminary Examiner asks the applicant the questions, were there any questions in addition to those on the form which the Preliminary Examiner asked the applicant, on the form which is Exhibit 3?
>
> Examiner Jordan: A. There might be many other questions if it appeared to the examiner that sufficient information was not disclosed on that form.
>
> Q. What was the custom and practice with regard to other questions asked at that time and place? Was there any custom and practice with regard to any particular questions that were asked by the Preliminary Examiner at that time and place?
>
> p. 279. A. As a rule, the petitioners were questioned particularly with reference to residence, family status and employment and possible arrests. The Examiner was not limited to the questions appearing on the forms in making his inquiry.
>
> Q. What questions was it the custom and practice at that time and place for the Preliminary Examiner to ask which were not on the printed form, in addition

to those you have just related? A. Well, that would depend entirely on the individual case and what might be indicated as being important."

Your Honors will perceive that the above is the sort of answer to be expected from a truthful witness. The Examiner functioned with a great deal of discretion. If the Examiner did not believe an arrest prior to the probationary period was important after learning the circumstances and the Examiner believed that "No" was a truthful answer because the applicant explained that he thought the question referred to arrests in the United States the Examiner might very well have noted, "Arr No" on the Face Brief. We continue to quote the record.

Miss Martin: Q. Were there some questions that were always asked and others which might have been asked? In other words, were there some fields or certain subject matter which it was the custom and practice to cover?

Examiner Jordan: A. The practice was to cover any matters that were required by law or regulation.

Q. What do you mean "required by law or regulation"?

A. The law requires the petitioner to meet certain standards and performance, and the regulations, to some extent, expanded the inquirer a little in those respects.

Q. You are referring now to the statute which sets out the requirement for naturalization? A. Yes.

As Your Honors know, the history of Paul De Lucia, even if it were as claimed by the Government, including an arrest and conviction in Italy, would not have disqualified petitioner. It must be remembered that the drive concerning communists was not in progress in 1928. Officials were not afraid to exercise authority and were not so concerned with preparing a record for self protection in the event the exercise of authority was questioned and investigated.

An official may very well have been satisfied that petitioner was in fact qualified. If such was the event, the papers including the abbreviations and hieroglyphics would be the same as those found in this record.

> (p. 286) Q. Were there any other questions which it was the custom and practice to ask the witness at that time and place by the Preliminary Examiners? A. Those were the principal ones. There might be others. That would vary with the individual case, and if it was something that seemed important to appear on the record the Examiner would make notations either on the front of the face brief or on the back.

Your Honors no doubt will take judicial notice of the fact that times have changed. That which an official might believe of sufficient importance to appear on the record in 1928 would be far different than that placed on the record today. If we are to speculate upon what may have occurred from slight circumstances, we must try to imagine conditions as they existed and not use conditions of today as standards. Judge Finnegan in *United States* v. *Minnerich*, 250 F. 2nd 721, 733 said:

> "Today, we must avoid viewing with hostile spirit the silence of Minnerich in 1928."

We continue to quote from the Jordan deposition:

> Q. Was there any particular requirement that the witness was supposed to know or testify to under the statute? A. Yes.
>
> Q. What was that? A. The law required the applicant to produce two citizen witnesses to testify concerning his residence and character for a period of five years preceding the date of the petition. • • •
>
> (292) Q. Was it the custom and practice for the Designated Examiner to interview the applicant and the two witnesses at the same time? A. That's right.
>
> Q. Was there any custom and practice with regard to questions which were asked by the Designated Examiner which might appear on Exhibit 3, the Prelim-

inary Form for Petition? A. The Designated Examiner was not limited in the scope of his questions to the information appearing on the documents you have referred to.

Q. What were his duties? A. To represent the Court in conducting a hearing as to the applicant's qualifications for citizenship.

Q. With regard to Preliminary Form for Petition, Exhibit 3, would any of the check marks with regard to the questions appearing on that form be made by the Designated Examiner according to the customs and practice at that time and place? A. They might be or might not. As a rule, if there were certain questions that he was emphasizing in his own mind, he would probably put his own check mark, regardless of what the Preliminary Examiner had done. * * *

(294) Are there any notations on Exhibit 2 with regard to these particular questions which it was the practice of the Designated Examiner to ask the applicant?

A. No, I don't find any such marks.

Here Examiner Jordan refers to the Face Brief. We submit that the above answers destroy entirely any theory based upon proof of custom or usual procedure. The Designated Examiner left no marks, identified as his. He might or might not have made marks.

Q. Was it a custom and practice of the Designated Examiner to make notations with regard to those questions? A. The only indication that he did make them would be the fact that he had recommended that the petition be granted.

Q. Where is that notation? A. That is the letter "G" under the third column in the block under the word "Adjournments."

Q. That is the customary notation when the Designated Examiner recommended grant? A. That's right. * * *

From the evidence all we know for certain is that the G and initials G.M. are in the handwriting of Designated Examiner McKay. When or where these were placed we do not know. Insofar as the evidence shows the fact, Mr. McKay may never have seen petitioner or his witnesses. That which caused Mr. McKay to place the G on the Face Brief is unknown. The Government Attorneys would like to have us guess that the G was placed there because of false representations made by petitioner, but there is no such proof. Judge La Buy drew the inference from the testimony of Examiners Durisch and Jordan (Vol. I, p. 335, 163 F. Supp. 36, 41) that petitioner had not disclosed all the facts material to the Designated Examiner and that such failure foreclosed further inquiry. We have no way of knowing what inquiry was made or that the officials desired or required any further information than that received. We do not know what information they had. We quote further from the deposition.

> (297) Miss Martin: Q. In other words, if in answer to the question of whether there had been arrests there was an indication of some arrest an additional investigation might have been requested?
>
> Examiner Jordan: A. It might have been, yes.
>
> Q. Tell us what the practice and procedure was. Would there always be an investigation under such circumstances?
>
> A. It would depend on the circumstances and the apparent seriousness of the offense and the time at which the offense had been committed.

We respectfully submit that the above questions and answers alone should have been enough to destroy any inference to be drawn from the markings, lack of marks, custom or usual procedure. If the circumstances, including the matter of seriousness and the time of an offense, prompted an examiner to approve an application, with no

desire for further investigation, how can it be said that an investigation had been foreclosed or thwarted?

We respectfully submit that after Your Honors consider the testimony of Examiner Durisch and Jordan and note the absence of Examiner McKay, it will appear that the so-called custom was quite flexible. A great deal was left to the discretion of the Examiners. It should be obvious that the examination of papers marked thirty years ago, by persons shown to have examined thousands, Examiners who had no recollection of this petitioner, failed to supply clear proof of any misrepresentation, concealment or fraud.

We now quote from Judge La Buy, (Vol. I, p. 335, 163 F. Supp. 36, 41) with the respectful suggestion that the conclusion of the District Court was not warranted by the testimony.

> "Stephen Durisch and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who serve on occasion as Designated Examiner, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul De Lucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

If Judge La Buy had omitted the above from the opinion, there may have been room for the argument that there exists a presumption that the trial judge gave no heed to the evidence of custom. But as Your Honors perceive, Judge La Buy based the decree squarely on the proof of custom. In fact the Trial Judge was compelled either to

do this, or enter judgment for petitioner. There was no other evidence upon which to base the above conclusion. Your Honors will find in 5 C. J. S. § 1564 (5), p. 1275, authorities in support of the following:

> "The presumption that the trial court considered only proper and admissible evidence in making its findings, however, is qualified by the conditions that the contrary must not clearly appear, that there be nothing substantial in the record to indicate the contrary, and that the presumption is unavailable where it is obvious that the court considered the improper evidence and that it influenced its decision, or that the findings were not based on proper and admissible evidence."

Now that we have called the attention of Your Honors to this branch of the evidence we respectfully request Your Honors to again read footnote 4 appended to the opinion of the Court of Appeals (p. 82, Footnote 3, 256 F. 2nd 487, 492). We respectfully submit the testimony omitted from this footnote spells the difference between an inference to be drawn and a speculation or a guess.

In *Cafari v. United States*, 217 F. 2nd 404, after stating that the Government offered to prove custom, which offer was rejected, Judge Woodbury said, p. 406:

> "The District Court rejected this offer of proof on two grounds. It said it was of the opinion that the evidence offered was legally insufficient to establish the Government's case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt, and furthermore, that it would not find such evidence persuasive even though it were legally admissible."

We copy the footnote written by Judge Woodbury, p. 407:

> "Although we do not question the probative value in some situations of evidence of a person's habitual or customary conduct as showing the conduct of that

person on a particular occasion (see 1 Wigmore on Evidence (3rd Ed. 1940) §§92, 93) we agree with the District Court's ruling excluding such evidence in the situation presented in this case. We therefore reject the Government's suggestion that in the event of our disagreement with the District Court's conclusion we should remand the case for a new trial in order that evidence of the custom and practice of the Examiners involved might be considered."

In the case at bar, the Court of Appeals refused to reject findings of the District Judge based upon proof of custom. This conflict in decisions, if permitted to stand is bound to create confusion. In many pending cases the question no doubt will arise in the future. The various published opinions show that this reliance upon proof of custom has often been had. After an order granting citizenship has been on the books for about 30 years, it is to be expected that the examiners may have passed on, or those surviving may not remember a particular applicant. In the case at bar, this Honorable Court is requested to decide if proof of custom such as this should be permitted to take the place of evidence. If Your Honors will compare the testimony of Examiner Durisch with that of Examiner Jordan it will be seen that there was no uniform custom. Even if the evidence should show a custom the same evidence shows that the custom can be disregarded at times. Also the evidence shows that the custom itself allowed latitude to the Examiners in such manner that a check mark means nothing further than that the question was asked and the Examiner was satisfied with the answer or explanation.

Here again with all due respect we submit that Judge La Buy failed to properly appraise the evidence. To put the above in another way, Judge La Buy has here held

that the testimony of Examiners Durisch and Jordan show that the defendant had not disclosed to Designated Examiner McKay all material facts. Such performance was impossible on the part of witnesses who did not remember the defendant or the occasion and were not present when Mr. McKay acted. Particularly where the record shows nothing done by Mr. McKay other than the placing of his initials with the letter G. Examiners Durisch and Jordan did not know whether Designated Examiner McKay ever asked petitioner anything. On the other hand, Mr. McKay may have made a full investigation based upon full and truthful information furnished by petitioner.

Your Honors will note that the Court of Appeals treated our objection as if we were merely objecting to the admissibility of the papers. We quote (p. 81, 256 F. 2nd 487, 491):

> "Again, he (De Lucia) states in Proposition of Law VII, the following: 'It was error for the Trial Court to allow evidence of custom and to give same probative value'. * * *
>
> "We construe De Lucia's contention that it was error 'to allow evidence of custom' to mean that the evidence of custom in this case was inadmissible because it was incompetent."

Even if Your Honors accept the construction placed by the Court of Appeals on our Proposition VII, (which we respectfully dispute) Your Honors will note that the Court of Appeals construed only the first half of Proposition VII. The second half was left with no further mention. No doubt, by approving the findings of the Trial Judge, the Court of Appeals is to be understood as having decided against petitioner also as to the second half. The second half may be re-stated as follows:

It was error for the Trial Court to give to the evidence of custom probative value.

We are unable to see any need to quibble over the fine point drawn relative to admissibility of exhibits. They were admitted. De Lucia demurred to all of the evidence including the exhibits. The position of De Lucia in all courts must surely be clear from the record. This position invited Judge La Buy to view the evidence in the most favorable light for the Government. Still the evidence is insufficient. The Court of Appeals distinguishes *Cufari* on the ground that Cufari testified and De Lucia did not. This alone, we respectfully submit, should demonstrate that the Court of Appeals failed to appreciate the force of the second half of our Proposition VII.

Even in an ordinary civil case findings which are the product of legal reasoning are free from the restraint of the clearly erroneous rule. *Thomas* v. *Commissioner*, 254 F. 2nd 233, 236.

XII.

The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable.

We have copied the above heading from our opening brief (p. 59). The reason we repeat it here is to point out that instead of any comment concerning the failure of Judge La Buy to make these findings, our opponents say (p. 9):

> "The courts noted further that concealment of a criminal record is grounds for refusing or cancelling naturalization."

The courts below noted that concealment of a criminal record is grounds for cancellation of a naturalization certificate (Vol. I, p. 333, 163 F. Supp. 36, 40, Pet. p. 80, 256 F. 2nd 487, 490). Our opponents here have added that such concealment is ground for refusing naturalization. We mention this because we do not wish to lose sight of the law which makes a difference in the burden of proof between refusing and cancelling. Before we reached this Honorable Court, the prosecutor and the courts below, in spite of anything we could do, insisted on mixing cases involving application for citizenship with denaturalization cases. Both of these were mixed with cases involving the deportation of aliens. Now we find our opponents here following the same plan. We trust that Your Honors will see the difference. We feel like apologizing for calling attention to the need of making such a simple easy distinction.

Here the Attorneys for the Government, in support of that above quoted assertion, cite the same cases cited by the courts below. Your Honors will note that in our brief (p. 59), we took up each of these cases in detail in order to show that it was a mistake to rely upon them under the facts in the case at bar. Our opponents have seen fit to ignore our endeavor to demonstrate that the courts below were misguided.

Your Honors will observe that our opponents blow hot and cold. Having to meet our claim that Judge La Buy had placed in the scales against petitioner his refusal to answer questions in pre-trial, our opponents argue that (p. 10):

> "While noting petitioner's failure to testify at the pre-trial deposition in its preliminary statement of the case (R. I. 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, • • •"

In other words, the Attorneys for the Government argue that the pre-trial incident was merely noted and not applied. Then when they come to consider our claim that Judge La Buy merely noted some law in reference to concealment of a criminal record, without explanation of its application, our opponents assume that that law had been applied to the detriment of petitioner. The trouble the Attorneys for the Government find themselves in springs from the ambiguity of the findings concerning some of the vital links in the chain. We respectfully submit that Judge La Buy did not just throw in some cases on concealment without some effort to connect them with the case at bar. The Judge was unable to set out the manner in which the cases applied, because there was no such evidence. The Court of Appeals, we respectfully submit, should have given heed to the situation created. As it is, Your Honors are requested to review haphazard findings, with no assistance of any value from the courts below or from the Government Attorneys here.

XIII.

In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below.

The Complaint (Vol. I, p. 4) alleges:

> "6. That in the proceedings which led up to his naturalization, the said Paul De Lucia formerly known as Felice De Lucia, alleged under oath: * * * c. * * * and further alleged under oath that he had never been arrested."

Now that Your Honors are familiar with the record, Your Honors know that there is no proof that De Lucia ever swore that he had never been arrested. The Preliminary

Form, Exhibit No. 2 (Vol. I, p. 313, Vol. II, p. 3) was not made under oath. Examiner Durisch (Vol. I, p. 86) testified to a custom and said that it was regular practice to swear an applicant and take him orally over the same ground, but we have no way of knowing what petitioner may have said concerning an arrest while under oath before Mr. Durisch.

Now if Your Honors will search the Complaint it will be found that the only allegation concerning the result of false and fraudulent representation concerning arrest is to be found in paragraph 8 (Vol. I, p. 5) wherein it is pleaded that these falsehoods were relied upon to cause the issuance of a Certificate of Arrival. The Certificate of Arrival (Exhibit No. 1, Vol. II, p. 1) was issued as a matter of routine. There is not a line of evidence to show what the officers issuing the certificate relied upon. Most likely they consulted the records at the point of entry. This certificate was issued, attached to the Declaration of Intention and filed, long before the Preliminary Form was signed, long before De Lucia saw Examiners Durisch, McKay, and Jordan.

We respectfully quote another heading from our first brief (p. 30).

XIV.

The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed admonishments of this Honorable Court.

In this reply as we have endeavored to follow and answer the Brief for the Opposition it may have appeared that we were joining our opponents in treating this as an ordinary civil case. If so, that was only for the purpose of argument. We trust that Your Honors will agree that

petitioner has a right to a re-examination here, notwithstanding the following, said by the Court of Appeals. (p. 80, 256 F. 2nd 487, 490):

> "From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and therefore, we are bound by those findings."

It is to be noted that the Court of Appeals did not say that that Honorable Court was bound until it was said that the record had been examined. The Court of Appeals also noted that Your Honors in *Schneiderman* v. *United States,* 320 U.S. 118, 123, held that the burden must be met with evidence of clear and convincing character. We quote from the Brief in Opposition (p. 9):

> "The Court of Appeals examined the record and found the district court's findings to be fully supported by the evidence and its conclusions of law amply supported by the federal cases.
>
> "These conclusions of both courts below are required by logic and law."

We respectfully pray that Your Honors will not accept such assertions without a careful re-examination. In making that re-examination, please keep in mind that petitioner demurred to the evidence put in by the Government. Your Honors need not be concerned with the matter of credibility. Petitioner took the position that, assuming the testimony to be true and drawing reasonable inferences, the Government has not met its burden of proof. It is true generally that where there is a direct conflict of testimony on a matter of fact, the question must be left to the trial judge to determine. But here there is no conflict in the testimony as to the *facts*. There being several inferences deductible from the facts which appear and equally

consistent with all of the facts, the Government has not maintained the proposition upon which alone plaintiff would be entitled to a decree.

In *United States* v. *Minnerich*, 250 F. 2d 721, 726, Judge Finnegan held that Rule 52, 28 U.S.C.A. must require a different reading than usual and said:

> "Following the clear direction of *Schneiderman*, *Klapprott*, and *Knauer*, we made an independent appraisal of the plaintiff's evidence presented on the issues of fraud and misrepresentation and found that the government's proof failed."

If the same Court of Appeals made an independent appraisal in the case at bar, that Honorable Court did not say so. We quoted from *Minnerich* in our opening brief, p. 32 concerning the meaning of § 340 (a). *Minnerich* was decided about six months before the opinion was filed in the case at bar. It is difficult to understand why *Minnerich* was not mentioned in the opinion rendered in the case at bar. The two cases seem to express conflicting view points in the same circuit. If the rule be that the last opinion in time prevails, we respectfully submit that Your Honors should not permit it to stand.

XV.

The order of naturalization entered in 1928 is res judicata. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree.

The above is a repetition of one of the headings in our opening brief (p. 34). We quote all that was said in the Brief for the Opposition (p. 10):

> "2. There is therefore no merit to petitioner's assertion that his order of naturalization is *res judi-*

cata even though it was obtained by misrepresentations and concealment of material facts. The very decision which he cites in support of this theory is conclusive authority for the fact that Congress has the power to provide for the revocation of naturalization on the ground of fraud. *Knauer* v. *United States*, 328 U.S. 654, 673."

In our opening brief we referred to *Knauer* in two places, here is the first, p. 30:

> "After reading *Schneiderman* v. *United States*, 320 U.S. 118; *Baumgartner* v. *United States*, 322 U.S. 665; *Klapprott* v. *United States*, 328 U.S. 601 and *Knauer* v. *United States*, 328 U.S. 654, we are certain that Your Honors will re-examine the record to determine if mistakes have been made."

Although our opponents made no reference to this duty imposed by Your Honors on this Honorable Court, we assume that the practice can not be questioned.

In the second place, where we quote from *Knauer*, p. 36, we do so in order to point out the care taken by Mr. Justice Douglas to distinguish *United States* v. *Throckmorton*, 98 U.S. 61, 66. Either our opponents did not read our brief very carefully, or they seek to fuzz it up some more. We believed that *Knauer* shows rather plainly that the point we make in our case has not been squarely decided by Your Honors. We again quote from Mr. Justice Douglas, p. 670:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—to behavior and conduct."

As we understand that said by Mr. Justice Douglas, it is indicated that a case such as the one at bar would come within the rule announced in *Throckmorton*.

We shall not repeat any more of our argument under this head, but we do respectfully present a short reply to the above quoted assertion made by the Attorneys for the Government.

Our opponents have erected a man of straw. We did not claim that Congress had no power to provide for the revocation of citizenship by misrepresentation and concealment of material facts, provided the statute is properly construed and applied. *Knauer* does seem to suggest limitations on the power of Congress.

In *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, Your Honors pointed out the difference between *res judicata* and collateral estoppel. In the case at bar, we submit, the distinction does not matter. Proof of good character, legal residence, lawful entry, etc., was in issue upon determination of which the finding and judgment was rendered. In *Sunnen*, Your Honors also mentioned the familiar rule that the parties are bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

XVI.

Some of our reasons for presenting this reply brief.

We note that Mr. Frederick Bernays Weiner in his book, *Effective Appellate Advocacy* advises a reply brief (p. 169):

> "(b) When the other side fuzzes up the issues, and you can reclarify the discussion by filing a short reply brief, it may well be helpful to do so."

One not familiar with the record, in the absence of a careful study of our petition and brief, might be deluded into the belief that the Government Attorneys had made

a fair statement of the case and a proper argument. An example of the manner in which the other side fuzzed up the issues is to be found in the following which we quote from the *Statement* presented here by the Government (p. 6):

> "The government proved further, by documentary evidence, that one Felice De Lucia was born in Naples, Italy, on November 14, 1897, the son of Antonio and Maria Annunziata (R. II, 11). Felice had four sisters, Emilia, Anna, Clementina and Luisa (R. II, 15). Felice De Lucia was convicted in Italy of voluntary homicide in 1917 (R. II, 18) and again, *in absentia*, in 1924, for the voluntary homicide committed in 1920 (R. II, 26)."

This statement would lead one not familiar with the record, to believe that there was *proof* that the convicted Felice De Lucia was in fact petitioner. There was no such proof. As we have pointed out, Judge La Buy refused to base inference on inference. The District Court did not find that petitioner had been convicted in Italy. No evidence was produced to show that the Felice De Lucia named in the foreign documents was in fact petitioner. No one identified the De Lucia on trial before Judge La Buy as having been convicted in Italy. (Our Brief, p. 17)

Another example of fuzzing is to be found in the following quotation from the Government brief (p. 8), which we have already noticed:

> "The Government proved that petitioner is the same Paul De Lucia who, in applying for entry and naturalization, asserted that his true name was Paul Maglio and that he had never been convicted of crime."

All of the representatives of the Government, commencing with the one who drew the complaint have used phrases like

"in applying for entry and naturalization".

The evidence having been heard, it really should be time for a little more care. There is not a scintilla of evidence to show that in his application for entry petitioner asserted that he had never been convicted of crime. There is no proof at all about what he may have asserted at the time of entry. When petitioner applied for naturalization his name was Paul Maglio. That is what he said and there is no evidence to show that it was not. We have already replied to the claim that the Government proved that in applying for naturalization, petitioner asserted that he had never been arrested.

In our opening brief (p. 57), we argued concerning the name. Now that Your Honors are more familiar with the record, it will be observed that there is no representation as to true name to be found in the Declaration of Intention (Vol. II, p. 1), or in the Petition for Naturalization (Vol. I, p. 320). The true name declaration is to be found in the Preliminary Form (Vol. I, p. 313, Vol. II, p. 3). This was, no doubt, talked over in subsequent conversations. In any event, there is no evidence that this Preliminary Form was ever exhibited to the Naturalization Judge. There is no proof that petitioner ever asserted that he had never been convicted of crime. Judge La Buy as we have said, did not find petitioner had ever asserted that he had never been convicted of crime. Judge La Buy did not find that petitioner ever asserted that he had never been arrested.

In giving these examples of fuzzing, we repeat another quote from the Government brief (p. 8), already noticed:

> "The court found that petitioner was the 'Paul De Lucia' who had falsely assumed the identity of 'Paul Maglio' for purposes of entry and naturalization and that petitioner was in fact 'Felice De Lucia' who had a criminal record."

Anyone not familiar with the record would understand that Judge La Buy found as a fact that petitioner was the Felice De Lucia convicted in Italy. As we have said, there is no such finding. As we have said, there was no proof concerning the entry, other than the ship record and the certificate of arrival. If petitioner said anything to the officials, true or false, at the port of entry, the record does not show it. We trust that Your Honors will not mind our repetition of some of these absent links in the chain of proof. It will be remembered, we hope in extenuation, that we have been unable to induce the courts below to take these gaps into consideration. Now, after our opening brief points out the lack of evidence our opponents nonchalantly assume that proof of these missing links have been made.

We again quote from the Government brief (p. 9):

> "In the light of its findings and the case law, it relied upon to reach its conclusions, it is obvious, as the Court of Appeals observed, that these 'other material facts' had reference to petitioner's criminal record."

Here again, the Government Attorneys fuzz it up by assuming that petitioner had a criminal record. The ultimate in fuzzing is attained when it is realized that all of this fuss about a possible conviction in Italy is really immaterial, if the real issues be understood. Our brief (p. 34), points up the real issue, *i.e.*, the effect to be given to the judgment.

As a further example of fuzzing, we quote the following from the Government Brief (p. 10):

> "In the instant case, petitioner not only hindered investigation initially by his concealment; he made a positive false assertion that he had never been arrested."

As we have said, there is no proof that De Lucia concealed anything, hindered investigation or made a false assertion.

We quote further from the Government brief (p. 10):

> "The government proved wilful misrepresentation and concealment of material facts, or, in the terminology of the prior statute, 'fraud'."

We respectfully submit that if instead of the above baseless conclusion, the Government Attorneys had paid more attention to answering the questions asked by us in our brief (p. 40), perhaps this reply brief would have been deemed unnecessary. Surely some effort on the part of our opponents to answer these questions would have been helpful to this Honorable Court. It is not our province to suggest to the Government Attorneys the manner in which their brief should have been prepared. It must be obvious that their tactics have given us alarm. We hope our fears will prove unfounded, but it should be remembered that we failed in our effort to cause the Court of Appeals to perceive that there existed no evidence upon which to base a finding that petitioner had hindered an investigation, or that he had made a false assertion that he had never been arrested. We respectfully endeavor to demonstrate that our failure was not because of the existence of evidence said by us not to be in the record.

We quote only a portion of the questions posed in our opening brief, p. 40:

> "(a) What concealments were made?
>
> (b) What misrepresentations were made?
>
> (c) To whom were they made?
>
> (d) How did their making result in the entry of the order of naturalization?"

Our opponents having chosen to ignore these questions, we respectfully request Your Honors to be on the lookout for possible answers as this record is being re-examined here. It will be found that there was absolutely no proof of concealments. No proof of misrepresentations. Judge La Buy did not find specifically that there had been concealment. The "concealment of other material facts" (163 F. Supp. 36, 41) was extended by the Court of Appeals to "failure to reveal convictions" (256 F. 2nd 487, 498). But the Court of Appeals does not undertake to say where and when this failure to reveal took place. Perhaps if the Court of Appeals had looked to the record in order to locate "where or when" it would have been seen that there were no concealments of other material facts.

We quote from:

United States v. Nechman, 183 F. 788.

"His certificate of naturalization recites that:

'It appearing to the court that he had made his declaration of intention to become a citizen of the United States, according to law.'"

"'This can have but one meaning. All other requirements of the law necessary to sustain his application for naturalization, as the law then stood, are found by the court and recited in its certificate. There is an entire absence of testimony that any fraud was perpetrated upon the court, or that there was any illegality committed by which Nechman's certificate was procured. There is, therefore, nothing in section 15 of the statute of 1906 which would warrant this court in cancelling his certificate. The facts were all directly before the court and it passed its judgment upon them.' 'The judgments of courts may not be impeached for any facts, whether involving

fraud or collusion, or not, or even perjury, which were necessarily before the court and passed on.'" (Citing cases.)

We quote from the complaint in the case at bar (Vol. I, p. 6):

"9. That the concealments and misrepresentations of the said Paul De Lucia in paragraph 1 (b) heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States.

10. That the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States; to prevent the making of a full and proper investigation of his qualifications for citizenship; to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts; to make the unconditional recommendation to the court that his petition for naturalization be granted and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law.

11. That the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above."

Now that the evidence is before Your Honors this Honorable Court might eliminate and disregard the charge where ever it is said that any misrepresentation was made in order to deceive the court, or to preclude inquiry by the court concerning the qualifications and eligibility of peti-

tioner. The judgment order shows that the court did hear further testimony. Just how much inquiry was made does not appear. The necessary findings were made. The extent of the inquiry was left to the discretion of the Naturalization Judge. There is no showing that the court was deceived. There was no evidence upon which to base a conclusion that concealments and misrepresentations had been made in the proceedings leading up to naturalization.

As we have said, Judge La Buy failed to give to the judgment the force to which petitioner was entitled. Judge La Buy erroneously allowed the Government to endeavor to contradict the specific findings of the judgment by oral testimony concerning an alleged custom existing among Naturalization Examiners.

If in fact the Examiner recommended the petitioner, the record indicates that the Naturalization Judge did not rely entirely upon the recommendation. There is no evidence that the Naturalization Court was even informed of any recommendation. The Court looked into the matter of qualifications and determined that all required procedure had been taken.

Now all we need do is to point out to Your Honors that without evidence from McKay, or its equivalent, there is no case. The Trial Judge overlooked the vital point that unless Examiner McKay or Examiner Jordan was deceived by the defendant on some material matter, the Government has no case based upon its own theory. Examiner Jordan gave no testimony from which it could be inferred that he had been deceived.

Without the testimony of McKay, Your Honors cannot know what he may have learned or what influenced him to recommend the defendant, assuming for the sake of argument that Mr. McKay did recommend. All we can learn from the evidence is that Mr. McKay was the Designated Examiner in this case.

Examiner Jordan knew from discovering his initial on the Face Brief (Ex. 3, Vol. II, p. 6) that he, Mr. Jordan, had taken this defendant, with others, before the naturalization Judge.

We quote further from the deposition given by Mr. Jordan (Vol. I, p. 269):

> "Miss Martin: Q. Can you tell us in what capacity your signature appears on this document? In what capacity were you acting when you placed your signature on there?
>
> Examiner Jordan: A. I was acting as the representative of the United States Government who presented the case to the Court for final admission; or the word 'Final' would probably be superfluous there.
>
> Q. Does it show on the face of this document whose petition for naturalization was under consideration?
>
> A. Yes.
>
> Q. Do you know what that was?
>
> A. Only what I read on the form now.
>
> Q. You do not recall the person?
>
> A. I do not."

It appears that Mr. Jordan (Vol. I, p. 269) acted for the Government before the naturalization Judge. Examiner Jordan did not remember the person. The United States Attorney did not ask him if he had talked to petitioner or if he had examined any report made by Mr. McKay or any other papers on records. This line of questioning was not followed up no doubt because Mr. Jordan said he knew only that which he read on the form called a Face Brief. That amounts to nothing. There is no writing on the face brief or any other paper to give any hint of what may have been asked of De Lucia by Mr. McKay. It is true that Mr. Jordan did not remember this case but that alone does not excuse the questioner from at least trying to find out from him what really happened. He was not asked what the practice would be if for any reason

a Designated Examiner could not carry on through and take a petitioner to court. It is reasonable to assume that this was not the only time that an Examiner who took part in a case was unable to appear after the 90 days and another Examiner took over. *Cf. Alexious* v. *Rogers*, 254 F. 2nd 782, 785. Did the next man like Mr. Jordan merely look at the face brief, observe the "G" and carry on without learning what had been done by the previous examiner. Did Mr. Jordan make any effort to learn whether the answer, "No" to arrests, meant arrests in this country? Did Mr. Jordan make any effort to learn why petitioner used one name in his Declaration of Intention and desired to legally change that name as prayed in his Petition?

Examiner Jordan said further (Vol. I, p. 303):

> "A. As a general rule. Although, I must state for the record that occasionally there might be one or two cases that would not require more than a very few minutes of the Court's time that would be held until after the group had been admitted, then they would be presented to the Court."

In the year 1928 inquiry about arrests in the course of the naturalization process was not required, either by statute or departmental recommendation. (*Cufari* v. *United States*, 217 F. 2d 404, 409)

There is no evidence that Designated Examiner McKay ever looked at the preliminary form or gave any heed to the matter of arrests. Mr. Durisch said it was the custom to send the Face Brief (Exhibit 3, Vol. II, p. 6) along to the Designated Examiner. Mr. Durisch and Mr. Jordan identified the initials G.M. on the face brief as having put on there by Designated Examiner McKay. If Mr. McKay examined the face brief and observed the code mark "no arr" and understood, either with or without inquiry, that notation to mean no arrests in this country within the

five year period, there surely had been no deception of Mr. McKay. It is very probable that the five year period was all Mr. McKay was interested in. *Cf. Baghdasarian* v. *United States*, 220 F. 2nd 677, 680.

In an effort to make an intelligent guess as to what was of interest to Designated Examiner McKay, Your Honors might consult *Application of Murra*, 178 F. 2d 670 where it was held that facts developed by an inquiry concerning a petitioner for naturalization previous to the five year period cannot be used as the basis for disqualification. (The statute has been amended since 1928.) *Cf. Marcantonio* v. *United States*, 185 F. 2d 934, 937.

Even if Judge LaBuy had jurisdiction to look for fraud in the making of the preliminary papers, which did not affect the jurisdiction of the Naturalization Court, the Government would be required to show that the defendant wilfully lied. If in fact petitioner understood or was informed that the question was directed to arrests in the United States he may have been mistaken, but he did not falsify. *Cf. United States* v. *Kessler*, 213 F. 2d 53, *United States* v. *Minnerich*, 250 F. 2d 721.

Mr. Durisch did not say anything about what he understood the question to mean at the time. If in fact Mr. Durisch understood the question to mean, have you ever been arrested since your birth, either in this country or in the old country, it would have been his duty to explain that construction to the immigrant. On its face the question is open to more than one construction. In the absence of testimony, Your Honors are required to assume the innocent version, in view of the burden on the Government to prove fraud, including a wilful intention to deceive. Fraud is not presumed, on the contrary the presumption is always against fraud. (Authorities collected in 31 C.J.S.

p. 747, § 126) Examiner Durisch did not claim to have been deceived, nor did Designated Examiner Jordan.

In *Re Jow Gin*, 175 F. 2d 299 matters such as those alleged in the case at bar, upon which any proof was introduced and claimed to have been fraudulent, are held not to be jurisdictional. At most they touch on the question as to whether petitioner met the statutory requirements as to character, residence, entry etc. These questions were for the Naturalization Judge and within his jurisdiction. The Naturalization Judge, upon testimony produced in open court, decided these questions in favor of petitioner. That should end the matter. Judge La Buy was without jurisdiction to vacate that valid judgment, on the grounds stated by the District Court.

The actual court order should surely settle any uncertainty. Judge Major in the case of *In Re Jow Gin*, 175 F. 2d 299 reviews some of the statute. Your Honors will note that the statute requires the report of the Designated Examiner to be in writing. In the absence of the production of such a report in the case at bar, Your Honors might assume that the procedure of merely putting the application through on the report of the Designated Examiner was not adopted. Or it might just as well be assumed that back in 1928 the officials did not follow the statute. If they disregarded the statute, it is fair to say that they often violated the regulations and deviated in some cases from the usual procedure. Here again we pursue the theory of the Government for the sake of argument. Your Honors well know that Judge La Buy had no legal right or jurisdiction to ignore the order of the Naturalization Court. We quote from *In Re Jow Gin*, p. 302:

"(4) Sec. 734(a) provides that 'every final hearing' shall be had in open court and that at such 'final hearing' the witnesses shall be examined under oath before the court and in the presence of the court, except that this requirement is dispensed with by Par. (b) of the same section in any case where a designated examiner has conducted the preliminary hearing authorized by subsection (a) of section 733.' It is further provided, however, in the same paragraph that even though a Designated Examiner has conducted the preliminary hearing, 'the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.' As we said in the *Mwra* case, 166 F. 2d at page 606:

> 'It thus appears that there are two ways in which a petition for naturalization may be disposed of: (1) the court may act upon the report of an Examiner who has conducted a preliminary hearing and who is required to make findings upon which his recommendation is predicated; and (2) a hearing in open court where the witnesses must be examined before the court and in the presence of the court.'

"In the cases of the former class, the statute contemplates that the court act upon the findings and recommendations of the Examiner and is not required to make findings of his own, while in the cases of the latter class, the court hears witnesses, examined in open court, and must make findings as to the facts thus disclosed. As already shown, if either the petitioner or the court is not satisfied with the findings of the Examiner a hearing may be ordered in the discretion of the court and must be ordered upon demand of the petitioner. The language which Congress has employed is, in our judgment, not reasonably susceptible of a different interpretation."

Then Judge Major quotes from a previous opinion in the same case as follows, p. 301:

"Under those circumstances we said 166 F. 2d page 607:

> "Thus the hearing before the court is not for the purpose of reviewing the recommendations of the examiner, it is a hearing *de novo* and it is obvious that the court must decide the issues upon the testimony which it hears, and that neither the testimony heard by the Examiner, his findings nor his recommendation are of any consequence."

In the case at bar it appears that Judge La Buy, instead of giving heed to the law as explained by Judge Major, adopted the theory of the Government. Judge La Buy gave no weight to the order entered by the Naturalization Court or to the recitals in the Certificate. Judge La Buy paid no attention to the fact that the Government failed to produce the written recommendation or report of the Designated Examiner, or the failure of the Government to offer any explanation as to why such evidence was not produced. Judge La Buy gave no heed to the fact that the Government failed to produce or account for other records and writings which may have shed light on what took place before the Naturalization Court. We repeat that said by Judge Finnegan in *Penn-Texas Corporation* v. *Morse*, 242 F. 2nd 243, 248

> "These plaintiffs cannot select what they will reveal and then expect equitable relief. Strategy has its uses but full disclosure would have been more suitable before the chancellor below."

We note that Mr. Weiner, in giving advice in his book (p. 296), on the *Basic Approach of a Brief in Opposition*, states that the brief writer frequently can not afford to meet an issue head on. In the case at bar, it appears that the Government Attorneys have steered clear of many of the issues by avoiding mention of them. Although this is not a criminal case, Your Honors have indicated many principles applicable to such cases as this.

Instead of answering these questions, our opponents have made general statements concerning concealments and misrepresentations, without further specification. This shot gun attack is not new to the case, we respectfully submit that the record shows that both lower courts succumbed to the insistence of the United States Attorney that the Government had proven its case. Petitioner was caught in a drag net.

Another example of fuzzing is to be found in the following quotation from the Government Brief (p. 10):

> "The record shows, however, that the court's findings were based strictly upon the documented evidence."

This is not true. Anyone familiar with the record will know that the documented evidence left gaps in the proof; gaps which were never filled. By way of illustration, we again refer Your Honors to the foreign documents purporting to show convictions. They were dumped into the case without a scintilla of evidence to prove that they related to petitioner. Concerning other written evidence, the so-called Face Brief (Exhibit No. 3, Vol. II, p. 6), is largely unintelligible. The Preliminary Form (Exhibit No. 2, Vol. I, p. 313, Vol. II, p. 3), means nothing standing alone. The Declaration of Intention (Vol. II, p. 8), the Petition for Naturalization (Vol. I, p. 1), and the Certificate of Arrival (Vol. II, p. 8), help to establish proof citizenship.

The most important bit of documentary evidence which the prosecutors ignore and to which the courts below gave no heed consists of the judgment (Vol. II, p. 2), as follows:

Order of Court Admitting Petitioner.

> "Upon consideration of the petition of Paul Maglio and affidavits in support thereof, and further testimony taken in open Court it is ordered that said peti-

tioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America this Sept. 27, 1928.

It is further ordered upon consideration of the said Paul Maglio that his name be, and hereby is, changed to Paul De Lucia under authority of the provisions of Section 6 of the Act approved June 29, 1906 (34 Stat. L. pt. 1, p. 596) as amended by the Act approved March 4, 1913, entitled 'An Act to create a Department of Labor.'

Certificate of Naturalization No. 28277322 issued on Sept. 27, 1928."

Another important bit of documentary evidence ignored up to now is to be found in the recitals of the Certificate of Naturalization (Exhibit No. 5, Vol. II, p. 9, Vol. I, p. 324), which recites that the court found that petitioner:

"* * * had in all respect complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America. * * *"

In view of that quoted by Your Honors from previous cases in *Jencks* v. *United States*, 353 U.S. 657, 668 *i.e.*,

"For the interest of the United States in a criminal prosecution—is not that it shall win a case but that justice shall be done."

we trust that the Government Attorneys, in the case at bar, have not intentionally adopted the tactics suggested and advised by Mr. Weiner, *i.e.*, to give the interesting issues but a glancing blow. We regret that the Attorneys for the Government did not see fit to meet the issues head on, that they avoided many of the interesting questions presented. We trust that Your Honors will deem it proper to issue the writ of certiorari. Once that bridge is crossed, we are quite certain evasive tactics will be abandoned as a

matter of sound policy, if for no other reason. Mr. Weiner has also said (p. 296) that a brief in opposition is significant only in border line cases; further that most petitions are self denying, even if nothing were filed. We respectfully submit that this is not a border line case, important questions have been submitted. We hope that the Brief in Opposition has not veiled or confused the real issues to the extent that Your Honors obtained the impression that this is a border line case.

Concerning the length of our briefs, we beg the indulgence of this Honorable Court with a reminder that we deal with a circumstantial evidence case. Our claim that there is no evidence as to some vital links in the chain and that unfounded inferences have been drawn, requires us to survey the entire record. The Government Attorneys have said (p. 7):

> "(1). Much of the remainder of petitioner's prolix argument is a series of disjointed attacks on the court's findings of fact and its conclusions of law.[3]

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[3]He makes general assertions, for example, that the evidence is insufficient to support the findings and the findings insufficient to support the decree (Pet. 30); that it is impossible to ascertain either the underlying facts upon which the District Court relied or the findings upon which the Court of Appeals affirmed (Pet. 32); that the District Court made immaterial findings which confused the issue (Pet. 35, 36) and findings contrary to facts (Pet. 57); that the Court of Appeals failed to re-examine the findings and improperly added findings of its own (Pet. 51, 54); and that the District Court's conclusions of law were not applicable to his case (Pet. 55, 59)."

We respectfully dispute the charge that we have relied upon mere general charges without specification. We are sorry to learn that our opponents found our argument to be

tedious. It is possible that the monotony and dullness found by them caused them to lose interest. That would be one way to account for the inaccuracies here pointed out. Our concern is with what Your Honors are able to make out from what we have been trying to convey. Concerning the above list of examples designated as general assertions, we respectfully reply by stating that this list contains some of our points. Further, that our opponents have left many of them unanswered. We wonder, does the above footnote mean that we had no right to make such points? If so, the answer is to be found in *Schneiderman* and such cases cited in our opening brief, (p. 30). We did make an effort to keep our brief short (without much in the way of accomplishment). The mere accusation that we have merely made general charges has caused us to worry a bit. Our opponents have put us to the choice between the risk that Your Honors might possibly agree and this rather lengthy reply, designed to supply further detail.

We wrote our opening brief in the hope that we would be able to state enough of the record and the questions presented to show merit for the issuance of the writ. We withheld some of the details of our argument to be presented in the main brief. Upon receipt of the Government Brief, we ran scared. After all, the Attorneys for the Government have long experience with representation before Your Honors. No doubt Your Honors have learned to have confidence in that which is said by them concerning the record and questions presented. Your Honors no doubt would find it difficult to believe that they would intentionally misrepresent. We have not charged them with such misconduct. We know that much of the fuzzing is suggested by the opinions. Both courts below ran charges together without clear definition. It is possible that our

opponents became bored with our brief and consequently failed to follow it closely. We are quite certain that we could not afford to rely upon an assertion that our opponents have fuzzed the issues without examples and detailed argument.

If this were the ordinary civil case, we could not expect Your Honors to look back into the transcript in order to test the conclusions, findings, failure to find and possible mistakes, on the part of the Trial Judge. But Your Honors have said that a denaturalization case is not to be regarded on review as an ordinary civil case. At first glance Your Honors might be inclined to believe that we could have done with summaries rather than quotes from the record, that we might have spared Your Honors question and answer quotes. Our reason for our policy is that a summary would dilute and lose some of the truth. The questions at times reveal as much as the answers. For instance, if Your Honors decide to read the entire deposition of Examiner Jordan (Vol. I, p. 262) it will be seen that the Assistant United States Attorney examined the witness as if he were hostile. She showed by her questions that she was not satisfied with the answers. This situation arose because she was endeavoring to force the witness to conform to a pattern, in order to support the theory of the prosecution. The witness destroyed this plan by sticking to the truth and not telling more than he knew. Mr. Jordan had been with the Naturalization Service since 1912 (Vol. I, p. 263). No doubt he knew very well that there was no custom or regular procedure followed, the same in one case as in every other case. He must have known that the prosecutor was trying to get him to read meaning into the check marks and other notations not warranted by the facts. If the deposition of Mr. Jordan be studied it will appear that he has testified that there was no custom or usual procedure. What was done by the

Examiner depended upon the circumstances in each case. Your Honors must know that if we attempted to convince Your Honors of such a fact by a mere statement or summary, we would court the danger that Your Honors might fall into the error of accepting the general shot gun charge already approved by two courts below and repeated here by our opponents. After the charge made by the Solicitor General, that we made general assertions, the Government Brief in Opposition proceeds as follows, (p. 8):

> "The record, however, leaves no doubt that the government met the strict burden of proof required in a denaturalization proceeding. The evidence is clear, unequivocal, and convincing. *Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654; *Klapprott* v. *United States*, 335 U.S. 601."

We felt that we could not risk leaving our opening brief alone to answer, in view of the manner in which our opponents have garbled the record. Your Honors have already indicated in the cases last cited that a case such as this is of great importance not only to the naturalized citizen involved, but to many others. Mr. Justice Rutledge said, dissenting in *Knauer*, p. 676:

> "Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.
>
> "No native-born American's birthright could be stripped from him for such a cause or by such a procedure as has been followed here."

We are unable to understand how anyone can read this record and say that the evidence is clear, unequivocal and convincing. But such a statement by high officials such as our opponents, after two courts have formally announced

the same conclusion caused us to be certain that we could not afford to reply by a general assertion that the evidence is weak and that the Government failed to meet its burden. It was up to us to demonstrate from the record that the Government has no case. This takes time. The job can not be done without detail and argument as to each point. We risk again the accusation of prolixity, but our charges can not any longer be said to be general.*

XVII.

The value of the constitutional privilege was destroyed. De Lucia was penalized for reliance upon his privilege. When the Court of Appeals perceived that the District Court had erred and reversed the contempt case, the Appeals Court should have perceived that the error also made mandatory the reversal of the decree in the case at bar.

Mr. Weiner, in his book (p. 296, Section 137), advises the writer of a Brief in Opposition to be "always Belittlin". In the case at bar, the Government Attorneys have seen fit to omit many of the questions submitted by petitioner.

We respectfully refer Your Honors back to our opening brief, (p. 11) for one of these questions.

The case at bar presents a question not heretofore answered by Your Honors, except in principle. The answer is important to thousands of naturalized citizens. The question posed is,

> Can the Government proceed against a naturalized citizen with a design to revoke his certificate, without

* Please compare our situation with that of counsel on both sides in **Johnson v. United States**, 256 F. 2nd 849, where the findings below were such that counsel were compelled to cover all possible errors.

evidence, file the complaint, based upon falsehoods, and then put in motion the rules applicable to ordinary civil suits, in order to compel the citizen to either furnish evidence against himself or suffer reprisals!

Your Honors will note that the Government Attorneys have diminished the above question to the following: We quote from the Government brief, (p. 2)

"3. Whether the District Court improperly noted petitioner's failure to testify."

If that were the question it would be a waste of time to even present it. The answer to the question as put by the Government here is that the District Court would commit no error in merely making a note that petitioner failed to testify. But that is not the question presented. Our opponents had the following to say in argument (p. 10):

"While noting petitioner's failure to testify at the pre-trial deposition in its preliminary statement of the case (R.I, 325), the only subsequent reference made by the trial court to petitioner's silence dealt with petitioner's failure to testify at the trial itself, and all that the court said as to this was that petitioner's 'failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence.' (R.I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121. Thus, there was no unjustified reliance on petitioner's failure to testify."

Our opponents here have presented an argument new to these cases. In the courts below, the prosecutor moved for punishment and resisted the appeal in the contempt matter. In the case at bar, up to now, the Government has taken the position that the assertion of claim of privilege predicated upon the self-incrimination clause of the Fifth

Amendment was misplaced; it was a

> "false claim affecting not a title invocation and application of an adverse inference because of his failure to testify."

Now that the contempt case has been reversed, the Solicitor General makes a shift in defense. Of course it is possible that that official did not know of the position heretofore assumed by the United States Attorney. The briefs filed in the Court of Appeals in both cases have been certified here, but it does not follow necessarily that our opponents have examined them. It is doubtful if our local prosecutors, knowing Judge La Buy and being familiar with the record, would make the argument here presented by our opponents. We proceed to examine the new position assumed here by the Attorneys for the Government.

We quote from Chief Justice Taney in *Thurlow* v. *Commonwealth of Massachusetts*, 46 U.S. 504, 573, 5 How. 504, 573:

> "It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court."

Mr. Chief Justice Stone said in *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 295:

> "After trial, the district court held the statute applicable to petitioners and their employees and, as applied to them, a valid exercise of state power. 43 F. Supp. 981. The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings and conclusions of law." (citing cases)

Mr. Justice Sanford said in *Oklahoma* v. *Texas*, 272 U.S. 21, 42:

> "The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated

passages in the opinion considering the rights of the parties, but on an examination of the issues made and intended to be submitted, and which it was intended to decide."

We shall divide our reply to the above claim that Judge La Buy merely mentioned the pre-trial incident but gave it no weight, into two parts as follows:

(a) Judge La Buy did more than to merely note failure to testify in pre-trial.

(b) The rule concerning the effect of failure to testify at the trial was not applicable.

In its opinion (Vol. I, p. 336 *United States* v. *De Lucia*, 163 F. Supp. 36, 41) the District Court said:

"This memorandum shall constitute the Findings of Fact and Conclusions of Law:"

If Judge La Buy had not mentioned the refusal of De Lucia to submit to pre-trial interrogation, the Court of Appeals may have indulged in presumptions in support of the decree. The Court of Appeals might very well have presumed that Judge La Buy gave no heed to the pre-trial incident, when it came to the final consideration of the evidence. But as soon as facts are produced, presumptions fly out of the window. When the Court of Appeals found that Judge La Buy had included in the opinion of the District Court, reference to pre-trial, we respectfully submit that that Honorable Court should have considered and determined, if possible, just how much weight was given by Judge La Buy to the fact that De Lucia there invoked the Fifth Amendment. Instead of doing this, in the case at bar, the Court of Appeals remained silent concerning the Fifth Amendment. No mention is made of the privilege invoked. The Court of Appeals did say (p. 79, *United States* v. *De Lucia*, 256 F. 2nd 487, 490):

> "The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf."

The above quote is to be found in that portion of the Court of Appeals opinion describing the memorandum rendered by Judge La Buy. The Court of Appeals again referred to the fact that De Lucia did not testify at the trial (p. 83, p. 493) in the consideration of the authority to be found in *Cufari* v. *United States*, 217 F. 2nd 404, on another point. The Court of Appeals did not choose to mention the fact that De Lucia claimed the privilege. Nothing was said by the Court of Appeals concerning the pre-trial proceeding, or its possible effect on the ultimate decree. Your Honors will note that that said by the Court of Appeals and above quoted is not the same as that said by Judge La Buy.

Judge La Buy said, (Vol. I, p. 334, 163 F. Supp. 36, 41)

> "(1) The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence." (citing cases.)

The Court of Appeals did not mention this rule and chose to not indicate specific approval or disapproval. The Court of Appeals did announce a general approval of the law findings as follows: (Vol. I, 1.80, 256 F. 2nd 487, 490)

> "Its conclusions of law and the decree which it entered find ample support in the decided federal cases."

The Brief in Opposition seeks support for the decree in the rule stated by Judge La Buy. Later in this brief we shall examine the cases cited by Judge La Buy and again relied upon here by the Solicitor General.

In a separate opinion rendered in the contempt case (p. 87, *United States* v. *De Lucia*, 256 F. 2nd 493, 495) the Court of Appeals said:

> "(3) It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court."

We were in no position to complain that the Court of Appeals failed to state all of the reasons shown by the record in support of the claim of privilege. In one of our briefs filed in the Trial Court we referred to a pending indictment charging evasion of income taxes. We quoted some of the questions asked at pre-trial to show that they were designed to secure answers calculated to assist the United States attorney in the prosecution of not only that indictment but in a number of other prosecutions petitioner has reason to fear. One reason we have for calling our trial brief to the attention of Your Honors appears in the following which we quote (Vol. I, p. 56):

> "The *Costello* case
>
> "We quote from the Memorandum prepared by Your Honor.
>
> > 'The Court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the de-

fendant should be required to answer same. See *United States* v. *Costello*, 16 F.R.D. 428 Aff'd 222 F. (2d) 656, cert. den., 350 U.S. 847; *United States* v. *Lustig*, 16 F.R.D. 437.'

"Upon reconsideration we trust that Your Honor will decide that the *Costello* case is not in point here. In the case at bar, De Lucia was asked 109 questions. Costello was not in such a bad situation as that confronting De Lucia, or if he was his lawyers failed to acquaint the Trial Judge with the danger involved in any answers to the questions put to Costello. In the case at bar, we had pointed out to Your Honor reasons for concluding that De Lucia is in real danger and we incorporate additional reasons here in this brief.

Judge Swan said about *Costello*, p. 662:

> "'* * * but he still was under the necessity of showing some reasonable basis for his fear of self incrimination by answering the questions propounded. Judge Clancy rightly held there was no such basis'."

308 Your Honor will note that Judge Swan held that any conspiracy to obtain citizenship had terminated and that, p. 662:

> "'* * * the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred, was too remote to support a *bona fide* need for the assertion of the privilege'."

"We expect to point out here some of our reasons for requesting Your Honor to hold that the danger to De Lucia was clear and present, not remote. Upon reconsideration we trust that Your Honor will see that the *Lustig* and *Jerome* cases are not in point. There the defendants were premature with their claim of self incrimination.

"The background and history can better be understood after Your Honor considers the affidavit of Attorney Joseph Bulger submitted herewith. Your Honor

is authorized to take judicial notice of much of the background material, records, Congressional hearing reports, etc., as they were introduced before Judge Igoe in the parole warrant cases."

The affidavit of Attorney Joseph Bulger is appended to the contempt case brief filed in the Court of Appeals and certified here.

We repeat from our opening brief (p. 21) Judge La Buy failed to distinguish between the *Costello* case and the case at bar. One might read the opinion rendered by the Court of Appeals in the contempt case, (herein p. 85) without realization of the great difference between the *Costello* case and the case at bar. We respectfully submit that the power of supervision vested in this Honorable Court should prompt Your Honors to clarify the law upon the subject. Without such clarification, the opinions below will, no doubt, be used in furnishing prosecutors apparent authority to take advantage of naturalized citizens.

We respectfully submit that the contempt order helps to point up the manner in which the United States Attorney disregarded the rights given all naturalized citizens by Congress. The record shows that the Government officials started to build its case on what could be forced from petitioner. First with an administrative subpoena. Then the United States Attorney with a motion to strike the answer filed in the case at bar sought to compel petitioner to admit portions of the complaint in an answer. Then the Government filed Requests for Admissions Under Oath (Vol. I, p. 35) and took the position that the failure of petitioner to answer was binding as admissions. Then the United States Attorney sought oral answers in a deposition and obtained a rule to show cause. It is reasonable to conclude that if when he filed his complaint the

prosecutor was in a position to prove his case, without compelling petitioner to become a witness against himself, the prosecutor would not have resorted to all of this pre-trial procedure. If the maker of the good cause affidavit (Vol. I, p. 8) had been truthful he would have said that he was suspicious of petitioner and hoped to be able to later build a case against him. Good cause to institute a suit case can not exist in the absence of evidence to prove the charge.

As we write this the mail man brings *Isaacs* v. *United States*, 256 F. 2nd 654, to illustrate the manner in which prosecutors seek to tread upon the Constitutional rights of citizens by claiming that the right does not exist when in fact the prosecutor is at the same time making use of his power of inquisition. In *Isaacs*, the prosecutor brought a business man before the Grand Jury. When the witness refused to give evidence against himself and claimed his constitutional privilege, the prosecutor moved before the District Court to have him either answer or be punished. Your Honors will note from the questions and answers set out in the opinion that the prosecutor advised the witness that he had no constitutional rights. It is alarming to find such an abuse of power but that is not all. Instead of keeping the prosecutor within bounds the District Judge found the witness guilty of contempt. The Court of Appeals reversed. We respectfully submit that the witness should not have been obliged to go through the ordeal at all. The statement and re-statement of the principles involved by this Honorable Court is not enough to keep some prosecutors within bounds. We trust that Your Honors will see fit to grant certiorari in the case at bar. We respectfully submit that in order to safeguard the constitutional rights of citizens, it is not only necessary for this Honorable Court to remind prosecutors and some judges, of these rights, but Your Honors should, in the interest of the administra-

tion of justice, apply the principles to situations created by new methods of abuse. In the words of Chief Justice Warren, Your Honors should:

> "apply to ever changing conditions the never changing principles of freedom."

The fact that a District Judge, as experienced as Judge La Buy would fail to recognize rights guaranteed by the Constitution indicates that perhaps some of our judges have been misguided due to the broadening of the right to discovery pre-trial in general. To be specific, the fact that Your Honors denied certiorari in the *Costello* case has been taken as a green light, authorizing the establishment of a denaturalization case by means of interrogation of the defendants. We know that such result was not intended, but this record makes it clear that that is what happened. The denial of certiorari here will no doubt leave the opinion of Judge La Buy and of the Court of Appeals as authority for the prosecutor to first file his complaint and to then seek his proof from the mouth of the defendant. A defendant refusing will not only be punished with a contempt sentence, including jail, but the fact of refusal will be regarded as enough to convert a weak case into one of clear convincing proof. In *Dashback* v. *United States*, 254 F. 2nd 687 the sentence was three years.

In the consideration of this Petition for Certiorari, we respectfully submit that Your Honors are called upon, without any help from the Court of Appeals, to guess how much weight was given by Judge La Buy to the fact that De Lucia invoked the Fifth Amendment. We respectfully submit that the validity of the reasons urged in defense of the action of the courts below is a matter which this Honorable Court should consider. But first Your Honors are required to determine from the record just what action has been taken by Judge La Buy, with the approval of the

Court of Appeals. In hazarding a guess as to how far the District Court was influenced in its ultimate decree, please keep in mind that Judge La Buy was of the opinion that De Lucia had no right to the privilege. Of course if Judge La Buy had been correct in this and De Lucia claimed the privilege without right, the refusal to answer the pre-trial questions might have been, under some circumstances, fatal to the defense. At least Judge La Buy was consistent. Judge La Buy ruled in effect that De Lucia should either answer or take the consequences. One consequence was a fine. But why should Judge La Buy stop there? We respectfully submit that the Court of Appeals was not consistent. Considering the two opinions of the Court of Appeals together, in effect it has been said that Judge La Buy was mistaken in not recognizing that De Lucia had a right to refuse to answer without reprisal, yet at the same time, the Court of Appeals has approved the action of the District Court, when Judge La Buy threw this refusal into the scale. The inconsistent conclusions we here suggest are valid only if Judge La Buy did not in fact permit himself to be influenced in the final decision because of the pre-trial proceedings. That brings us back to the question now under discussion.

In order for Your Honors to guess at what may have influenced Judge La Buy it will be necessary of course to examine the record. Your Honors will note that prior to trial, Judge La Buy filed a memorandum (Vol. I, p. 47), concerning three government motions . . .

(1) To strike answer (Answer at p. 15)

(2) To compel answers to oral interrogatories (Interrogatories at p. 23)

(3) To compel answers to certain requests for admissions. (Requests at p. 35).

As to (1), Judge La Buy recognized the right of De Lucia under the Fifth Amendment to file a general denial. Consequently, the District Court overruled (1), (p. 48). The answer was accompanied by the following (Vol. I, p. 15):

Note of Explanation.

"There are some matters correctly stated in the complaint, but the defendant respectfully requests that he not be required to point them out and admit them for fear that it may be said later that he has waived his right to the protection of the Fifth Amendment. This defendant, if the occasion arises, intends to claim the privilege. In a general way it may be said that the defense is based upon the claimed validity of the judgment of the Naturalization Court. This answer is intended in good faith to put the case at issue and to require strict proof, particularly of matters alleged seeking to show the invalidity of said judgment."

As to (3) Judge La Buy said (Vol. I, p. 48):

"No provision can be found either in Rule 36 or in the other procedural rules which would authorize this court to compel a defendant to answer a request for admissions. *United States v. Schine Chain Theatres*, 4 F.R.D. 109, 111; *Momand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568, 573."

As to (2), Judge La Buy said (p. 48):

"The second motion is to compel the defendant to answer oral interrogatories posed at his deposition and which he refused to answer on the ground that he did not want to be a witness against himself and declared the privilege of the Fifth Amendment. The court has considered the questions submitted to the defendant, and without going into extensive discussion concerning the nature of a suit for denaturalization, is of the opinion the defendant should be required to answer same. See *United States v. Costello*, 16 F.R.D. 428 Aff'd 222 F. (2d) 656, cert. den., 350 U.S. 847;

United States v. *Lustig*, 16 F.R.D. 138; *United States* v. *Jerome*, 16 F.R.D. 138. * * * It is further ordered that the defendant answer the oral interrogatories posed at his deposition within three days from date hereof."

A couple of days later Judge La Buy filed a supplemental memorandum, further explaining reasons for overruling the Government as to (1) and (3) from which we quote (p. 50, 51):

> "It is apparent that the government considers this case to be an ordinary civil suit. However, the court must recognize the admonition of the Supreme Court of the United States, often repeated, that denaturalization suits are not ordinary civil law suits. In *Klapprott* v. *United States*, (1949) 335 U. S. 601, 611-612, the Court declared. * * * (quotation omitted).
>
> These emphatic declarations of the Supreme Court of the United States, impel this court to the conclusion that any default, including technical and procedural defaults which in ordinary civil cases result in evidentiary admissions, cannot be utilized to mitigate, lessen or relieve the government of the positive and affirmative burden imposed by the Supreme Court to prove its case 'beyond a reasonable doubt.'"

In this Honorable Court we respectfully submit that a fair and reasonable consideration of the record, including the above, leads to the conclusion that if Judge La Buy had been of the opinion that De Lucia had lawfully invoked the Fifth Amendment, Judge La Buy would have overruled all three of the Government motions. Judge La Buy having made this mistake as to the law in ruling on (2), it follows that the Trial Judge should have regarded, as Judge La Buy did, the refusal to answer as contempt. The record shows that Judge La Buy had been furnished briefs before and after the position taken by Judge La Buy as to these three Government motions. (pp. 16, 41, 46, 52).

It is fair to assume that Judge La Buy was of the sincere belief that under the facts and the law, De Lucia had no right to the privilege. It is idle now for the Solicitor General to argue that Judge La Buy merely noted the refusal in passing; that the Trial Court gave the incident no heed. As we have said, our local United States Attorney, knowing Judge La Buy and being more familiar with the record did not suggest that it was possible that Judge La Buy over looked the fact that petitioner had refused to comply with his order. The cases, contempt and denaturalization, were considered together in the Trial Court. We separated them for the purpose of appeal for fear of some objection to our record otherwise. Your Honors will note that said by Judge La Buy, which we quote from the opinion (Vol. I, p. 325, *United States* v. *De Lucia*, 163 F. Supp. 36, 37):

> "The defendant, although present in the courtroom throughout the trial, offered no evidence on his own behalf. He previously invoked the protection of the Fifth Amendment, and has refused to obey the court's order requiring him to respond to questions asked at his deposition. The sole information which this defendant has given is that he is Paul De Lucia and resides at 1515 Bonnie Brae, River Forest, Illinois."

Your Honors will observe that when the Solicitor General (p. 11) quoted from Judge La Buy the last sentence was omitted, *i.e.*,

> "The sole information which this defendant has given is that he is Paul De Lucia and resides at 1515 Bonnie Brae, River Forest, Illinois."

As is shown by the record (Vol. I, p. 23) that information as to petitioner's name and address was given in answer to the oral interrogatories before petitioner claimed the privilege. That is the only place in the record where this information was given.

It is of course possible that our opponents overlooked the significance of the omitted sentence. Now we ask Your Honors, is it not fair and reasonable to say that Judge La Buy has indicated that he took all of the above into consideration, including the omitted sentence? Why speak of the failure of De Lucia to give information unless the Judge believed that De Lucia was obliged to answer the pre-trial questions? Why speak of the refusal unless it be inferred that the refusal was wrongful and that this refusal helped to support the decision made? After all, the opinion was prepared for the purpose of demonstrating the ground for decision. Your Honors have noted that Judge La Buy took pains to have his reasons show in the record. Your Honors will note from the above quotation that Judge La Buy considered three things together, *i.e.*, failure to offer evidence, refusal to obey the order of court as to pretrial and refusal to supply information.

It is reasonable to assume that the Trial Judge from the beginning was certain that the loser before him would appeal. The care taken by Judge La Buy to have the record show support and reasons were demonstrated when Judge La Buy, after deciding the three motions and after rendering an opinion designed to show reasons, saw fit to supplement (p. 49) his original opinion on his own motion. Judge La Buy was careful to distinguish between (1) and (3) on one hand and (2) on the other, concerning the three motions made by the Government. If in fact Judge La Buy, in his final opinion, merely noted the refusal to obey and the failure to inform, as a preliminary statement of the history of the proceedings, Judge La Buy, being careful, would have included (1) and (3). (1) and (3) are part of the history as well as (2). In fact, all three belong in a related group. It is now fair for Your Hon-

ors to conclude that Judge La Buy considered that the Court had ruled on (1) and (3). They were no longer in the case. (1) and (3) had nothing to do with the final decision or decree. So it followed that (1) and (3) were omitted from the final opinion. (2) was included because Judge La Buy was still of the opinion that the refusal to obey and the failure to inform had a bearing on the ultimate outcome. If there be one matter in the case on which the District Court stood firm, it was that DeLucia was obliged to answer the interrogatories or suffer the consequences. The record shows that after Judge La Buy filed his opinion (p. 47) and supplemental opinion (p. 49), we submitted a brief (Vol. I, p. 52) in which we endeavored to show the error as to (2). Judge La Buy was requested to reconsider. At the opening of the trial, a motion for a rule to show cause was entered and decision on the rule was deferred until after the trial (Appendix Contempt Proceedings, p. 19). The record and printed appendix in the contempt case has been filed here for reference. The contempt order (p. 40) was entered four days after the final opinion in the case at bar was rendered. When the prosecutor asked the Judge to punish petitioner during the trial probably in the hope that an immediate jail sentence would cause him to change his mind and answer, it is reasonable to assume that Judge La Buy delayed action, waiting to see if petitioner would take the stand at the hearing. If petitioner had done so, the contempt sentence may not have been imposed. When finally Judge La Buy saw that petitioner persisted in refusing to testify or furnish information, the Judge punished petitioner, not only with a fine, but by invoking the rule said by Judge La Buy to give rise to an inference that petitioner was not in a position to combat or explain away the government's evidence.

Your Honors will note from one of the briefs filed (Vol. I, p. 57), that when petitioner was questioned by the prosecutor the danger was real, imminent and pressing. We quote from the dissenting opinion in *Brown* v. *Walker*, 161 U.S. 591, 628:

> "A final observation, which ought not to be necessary, but which seems to be called for by the tenor of some of the arguments that have been pressed on the court, is that the constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.
>
> "But surely no apology for the Constitution, as it exists, is called for. The task of the courts is performed if the Constitution is sustained in its entirety, in its letter and spirit."

We know that Your Honors will apply the law as to the Fifth Amendment regardless of any opinion Your Honors may derive from the record concerning the guilt or innocence of petitioner, but in view of the fact that our opponents assume guilt in the discussion of inferences permit us to suggest the possibility that De Lucia obtained citizenship in a proper and legal manner. Further that if petitioner were not under the fire of other prosecutions and was required to meet this charge alone, he might have been free to supply information. But then again, any such desire would no doubt, present difficulties. We quote from that said Mr. Justice McKenna, dissenting in *Wilson* v. *United States*, 221 U.S. 361, 392:

> "And it is asked, supposing a witness upon the stand in a prosecution for robbery, 'a question is put, the effect, of which were he to answer it might be to

subject him to conviction in respect to another robbery, attended with murder (such high offenses give emphasis to the argument) on the ground of public utility and common sense is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone?' Bentham on Judicial Evidence, vol. 5, page 229 *et seq.* A reply would be difficult if government had no other concern that the punishment of crime." * * *

"(394). The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power and that passion will not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened and destroyed they may be when interest and desire feel their restraint. What then of the end: will history repeat itself? And this is not a cry of alarm. '*Obsta principiis*' was the warning of Mr. Justice Bradley in *Boyd* v. *United States* against the attempt of the Government to break down the constitutional privilege of the citizen by attempting to exact from him evidence of fraud against the customs laws. I repeat the warning. The present case is another attempt of the same kind and should be treated in the same way."

Of course Your Honors know the importance of adhering to constitutional safe-guards. *Slochower* v. *Board of Education*, 350 U. S. 551, 557. Your Honors know very well that there exists a constant pressure to weaken these barriers. Your Honors know that there is a powerful element in our society, of the belief that one who claims the privilege must be guilty and should be punished. Such expression as "Fifth Amendment Communist" catch on because

of the existence of this element. Your Honors know too that some of those entrusted with the enforcement of our law make use of this sentiment.*

In *Bilokumsky* v. *Tod*, 263 U.S. 149, (Our Opening Brief, p. 82), the hearing officer drew an unfavorable inference from the fact that Bilokumsky, when questioned, under advice of counsel, stood mute. Your Honors approved. Bilokumsky was an alien. Please compare with *Bean* v. *Barber*, 163 F. Supp. 111. Bean filed an action in the District Court seeking to enjoin the District Director from excluding him from the United States. We quote, p. 112:

> "Defendant, relying on Section 212 (a) (20) of the Immigration and Nationality Act (8 U.S.C.A. § 1182 (a) (20), answers the complaint by asserting that the special inquiry officer and the Board of Immigration Appeals properly denied plaintiff entry as a citizen of the United States in view of his refusal to answer relevant questions put to him by the officer of the Immigration Service."

Judge Harris granted summary judgment and said, p. 113:

> "However reprehensible the conduct of plaintiff in absenting himself from the United States in order to avoid service in the Armed Forces, he cannot be required to forfeit his established citizenship as the result of procedural legerdemain. Section 8 U.S.C.A. § 1182 has no application under the facts herein. Therefore, plaintiff is entitled to remain in this country absent legal and appropriate steps to deport him."

Although we are unable to ascertain from the opinion in *Bean* whether or not the *Bilokumsky* case was mentioned, it would be reasonable to assume that the hearing officer and the Board relied upon some such case as *Bilokumsky*. If so, those officials failed to distinguish between the status

* In **Sternberg v. United States**, 163 F. Supp. 590, an act of Congress designed to punish one receiving an annuity who invokes the Fifth Amendment was held unconstitutional.

of a citizen and an alien. That, we submit, is what happened in the case at bar, Judge La Buy failed to keep that important distinction in mind. Judge Harris was able to see that the case for the Service was lacking in a vital element. Judge Harris was able to understand further that that element could not be supplied

> "—in view of his refusal to answer relevant questions —"

So Your Honors must be constantly on guard to prevent, if possible, the use of silence in the place of evidence in cases where it is improper to apply any such rule resulting in "procedural legerdemain."

XVIII.

The question concerning the abuse of the Federal Rules of Procedure is properly before this Honorable Court.

We quote from the Brief in Opposition (p. 7):

> "At the outset, we point out that the Court of Appeals has reversed petitioner's conviction for contempt in refusing to answer questions asked during a pre-trial deposition (Pet. 85-86) and the government has not petitioned for certiorari in that case. Petitioner's argument with respect to the abuse of the Federal Rules of Civil Procedure is, therefore, not properly before this Court."

It is true that the Court of Appeals reversed in the contempt case but, as we have pointed out, the fine assessed was not the only punishment. If the fine in fact was the only punishment it may have been easier to pay it than foot the bill for the costs of appeal. A principle was involved. We respectfully submit that the question concerning the abuse of the Federal Rules of Civil Procedure is properly before this Honorable Court for the reason that such abuse resulted in furnishing a prop to the decree, because of the mistaken opinion that petitioner had no right to the privilege. Of course the privilege has no value if its claim results in an assumption that because of petitioner's refusal

to answer or give information that "he was not in a position to combat or explain away the Government's evidence." (Vol. I, p. 334, 463 F. Supp. 36, 41) The sanction was applied in the case at bar. If there were any logic to the position taken by the Government Attorneys here, the Government could have confessed error in the contempt case and left petitioner without a remedy. More procedural legerdemain.

XIX.

The Court of Appeals erred in approving the application of a sanction by the District Court because of failure to testify.

We again quote from the Government brief (p. 11):

> "* * * failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain the government's evidence' (R. I, 334). This is equivalent to saying that the government's case stood unrebutted. See *Holland* v. *United States*, 348 U.S. 121.' Thus, there was no unjustified reliance on petitioner's failure to testify.

> "'This Court there said, of a criminal case, 348 U.S. at p. 138-139: 'Once the government has established its case, the defendant remains quiet at his peril'."

Your Honors of course will note that the quote from the *Holland* case demonstrates that the rule applies only after the Government has established its case. In the case at bar, Judge La Buy applied the rule in order to bolster up the Government case, where the evidence had failed.

We next examine the cases cited by Judge La Buy under the following, (Vol. I, p. 334):

> "The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence."

Your Honors will observe that the Court of Appeals did not choose to cite the following cases cited by Judge La Buy. So we decided to not mention these cases in our opening brief. Our opponents here rely upon the rule announced by Judge La Buy, but instead of citing these cases, as authority for the rule, they cite but one case, *i.e.*, *Holland* v. *United States*, 348 U.S. 138-139. The *Holland* case is authority for our position as well as are the cases cited by Judge La Buy. In the *Holland* case Your Honors took pains to establish that the lower courts were justified in holding that the defendant had been proved guilty beyond a reasonable doubt. It was only after such proof was seen to have been produced that Your Honors said that the defendant had remained quiet at his peril. In the case at bar, we contend that the Government failed to establish even a *prima facie* case, so it follows that Judge La Buy erred in applying the rule.

We submit that it may be important to determine if Judge La Buy was misguided concerning the law by these cases. Perhaps the reason these cases were not repeated by the Court of Appeals is that that Honorable Court perceived that the rule was not applicable. Still, we submit, it is important to determine what may have influenced Judge La Buy. It is possible that if Judge La Buy had taken a different view of the law, the decision may have been different.

Mammoth Oil Co. v. United States, 275 U.S. 13.

We quote (p. 51):

> "The guiding considerations by which the proper significance of such silence is to be ascertained were well stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster*, 5 Cush. 295, 316: 'Where, for instance, probable proof is

brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution." While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (*Northern Railway Company* v. *Page*, 274 U.S. 65, 74), it justly may be inferred that he was not in position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. *Runkle* v. *Burnham*, 153 U.S. 216, 225; *Kirby* v. *Tallmadge*, 160 U.S. 379, 383; *Bilokumsky* v. *Tod*, 263 U.S. 149, 154; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111; *Clifton* v. *United States*, 4 How. 242, 247; *Missouri K. & T. Ry. Co.* v. *Elliott*, 102 Fed. 96, 102. As to facts appearing to have been within the knowledge or power of Sinclair, we find that the evidence establishes all that it fairly and reasonably tends to prove."

We have quoted at length in order to remind Your Honors that the rule does not apply at all *without a pretty stringent proof of circumstances to prove the charge* and where applied the absence of denial alone is not entitled to much weight. Your Honors will consider that in his answer (Vol. I, p. 52) De Lucia denied everything. His failure to testify

is explained in his fear of other prosecutions. We have adopted a portion of the argument made by the lawyers in the above cited case as follows, p. 15:

The legal effect of the evidence is always a question of law. The rule in the federal courts has long been well settled that fraud is not to be presumed; that it is not to be presumed from any number of lawful acts; that where an act and circumstance are as consistent with an honest motive as with a dishonest one, the former must be preferred; that fraud cannot be proved by a bare preponderance of the evidence, but only by evidence that is clear, unequivocal and convincing.

No inference is reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption. The law requires an open, visible connection between the principal fundamental facts and the deductions to be made on remote inferences. A presumption is not a circumstance in proof, and it cannot therefore be made the legitimate foundation for another presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact which is sought to be established by the dependent presumption. (citing cases)

No unfavorable presumption arises from the failure to produce evidence unless there is some duty to produce it, nor unless it is shown to be within the control of the party who fails to produce it, nor from the failure to call as a witness one whom the other party had the same opportunity of calling, nor if the testimony not given is privileged. (citing cases.)

No inference may be drawn from the refusal of the witness to testify on the claim of constitutional privilege

against self incrimination. *Beach* v. *United States*, 46 Fed. 754; *State* v. *Harper*, 33 Ore. 524; *Powers* v. *State*, 75 Neb. 226; *State* v. *Weaver*, 165 Mo. 1.

A defendant is not called upon to introduce evidence to contradict or explain facts which are insufficient to establish any liability against him. The true rule, is that silence of a party, may be considered in weighing proofs already adduced tending to fix a liability on him in matters where complete and more exclusive knowledge of the facts concerning which he is silent, is laid at his door. (citing cases.)

Some authorities are to be found cited in 70 C. J. Witnesses, p. 754 § 910 to support the following:

> "No inference prejudicial to either party can legitimately be drawn from the witness' assertion of his privilege of refusing to answer on the ground that the answer may tend to incriminate the witness."

Local 167 of I.B. of Teamsters v. United States, 291 U.S. 293

This was an injunction suit. A previous criminal judgment had conclusively established the conspiracy and the parties. Mr. Justice Butler said:

> "The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants participation continued until the filing of the complaint."

Your Honors know that where one claims he has withdrawn from a conspiracy a special rule applies. Our claim in the case at bar is that the Government failed to introduce substantial evidence and that Judge LaBuy failed to consider the asserted reasons given by the defendant for failure to testify.

United States, ex rel Bilokumsky v. Tod, 263 U.S. 149.

Here the defendant was afforded an administrative hearing. After an order of deportation he obtained a writ of habeas corpus in the District Court. His writ was dismissed and he appealed. This Honorable Court said, p. 157:

> "Moreover a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received." (citing cases.)
>
> "To prove alienage the inspector called Bilokumsky as a witness. He was sworn, but when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name."
>
> "Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak."

United States, ex rel Vajtauer v. Commissioner of Immigration, 273 U.S. 103.

Here an alien defendant in an administrative proceedings was ordered deported. After a hearing the District Judge dismissed his writ of habeas corpus and he appealed. In the administrative hearing the defendant indicated that he would explain after all of the evidence was in. His silence was commented on by Mr. Justice Stone after citing *People* v. *Pfanschmidt*, 262 Ill. 411, 449 p. 112.

Runkle v. Burnham, 153 U.S. 216.

This was a suit on a contract. Runkle and his attorney had testified. Mr. Justice White said, p. 225:

"If the new power of attorney was sent, and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents. Their silence must necessarily make against them on the question of revocation." *Mansfield J., in Holdane v. Harney*, 4 Burr 2484, 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of *Clifton v. United States*, 4 How 242."

The last sentence of the opinion is as follows, p. 228:

"The failure to produce it, or to testify in reference to it, when its contents were peculiarly within the knowledge of Runkle, justifies the presumption that its provisions would have been unfavorable to Runkle's position."

Kirby v. Tallmadge, 160 U.S. 379.

This was a bill in equity, a dispute over title to land. A party to the action had exclusive possession of a knowledge of facts and failed to offer them in evidence.

Northern Ry. Co. v. Page, 274 U.S. 65.

This is a personal injury suit against a railroad operating in Costa Rica. Plaintiff was shot by soldiers while a passenger. One of the questions involved was whether the conductor informed the officer in charge of the troops that the train carried no revolutionists. The conductor testified but the record fails to show all of his testimony. The trial judge directed a verdict and the Circuit Court reversed. This certiorari followed. Mr. Justice Butler noted, p. 73 that:

"In the opinion of the majority of the Circuit Court of Appeals it is said (p. 752): 'The jury might have found that, inasmuch as Ramsay, the conductor, did not

testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train; nothing of the kind was said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train, or received it too late and under such circumstances as to render it unavailable.'

"This view cannot be sustained. There was no basis for the court's assumption. There was nothing reasonable to warrant the rejection of Grant's testimony. Indeed, plaintiff's own testimony tended to corroborate Grant. And the district judge in charging the jury assumed as an undisputed fact that when the train stopped the officers were informed by Ramsay and Veitch that there were no revolutionists on the train. The case having been so put to the jury, it is to be assumed that they considered the matter on that basis. Defendant was not required to satisfy the jury that it was not guilty of the negligence alleged against it. If Ramsay had not testified at all, his failure so to do could not be taken as substantive evidence of any fact. If, instead of showing that Ramsay had told the officers that no insurrectos were on the train, plaintiff had put in testimony that no such information had been given to the government forces and then Ramsay had remained silent, it would have been permissible to draw an inference that he was not in position to assert the contrary. But that is not the situation here presented." (Citing cases.)

So Your Honors will perceive that this Railroad case instead of supporting the position taken by Judge La Buy does just the opposite. Your Honors have noticed that Judge Butler said:

"If Ramsay had not testified at all, his failure so to do could not be taken as substantive evidence of any fact."

In the case at bar, De Lucia did not testify and Judge La Buy took that as substantive evidence of facts missing from the case for the Government.

United States v. Roberson, 233 F. 2d 517.

We could not find a better case in support of our argument than this *Roberson* case. It demonstrates clearly the error committed by Judge La Buy. The Government seized an automobile claiming that it was being used in violation of gambling laws. The District Judge found for the defendant. The Government appealed. Judge Cameron said in affirming the trial judge, p. 519:

"(1) It is suggested that the failure of the claimant, Roberson, to testify and thereby explain the purpose for which the automobile was being used when it was seized was a fact which should have been taken against him. Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position. *Local 167 International Brotherhood of Teamsters* v. *United States*, 291 U.S. 293; *Anderson* v. *United States*, 185 F. 2d 343; *Williams* v. *United States*, 199 F. 2d 921, and *Kent* v. *United States*, 157 F. 2d 1.

"It is equally well settled, however, that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a *prima facie* case. It will not excuse a failure of the Government to meet the burden of establishing facts sufficient to make out a case for forfeiture. Until the Government had sustained the burden of producing evidence establishing its right to forfeiture, the claimant had no call to bring forward any evidence at all, but was entitled to submit the

case to the fact-finder, trusting solely to the weakness of the Government's evidence.

"(2) Corpus Juris Secundum classifies this principle of law as a Pseudo-Presumption and discusses its effect in some detail, stating: 'Necessity for *prima facie* case. Where the party on whom the burden of proofs rests had failed to make out a *prima facie* case, the absence of the adverse party, or his failure to testify, raises no unfavorable inference against him.' This Court recognized in a libel case the inference allowable against a party who fails to testify and supply information within his knowledge but called attention to the limitations on this rule: 'This is not to say that (defendant's) silence could supply a complete failure of proof. It is to say, though, that with the proof as it was, having at the least a strong tendency to prove the case for forfeiture, claimant's failure to offer an explanation of the incriminating circumstances could be taken against him.'

"(3, 4) It is not necessary to discuss the effect of the permissible presumption in a proper case because it is clear here that the Government's proof did not establish even a *prima facie* case for forfeiture. It was necessary for the Government's evidence, of itself, to be sufficient to support the judgment sought. The Government's evidence, and all inferences which may be drawn therefrom, were entirely inadequate to support its demand for condemnation and forfeiture. We cannot say that, in the face of this weak showing, it was not natural and prudent for the claimant to introduce no evidence at all. He was in position to rest secure upon the failure of the Government to make proof which would justify forfeiture. Under these circumstances, the failure of the claimant to testify cannot work against him so as to supply a case where, before, none existed."

Daniel v. United States, 234 F. 2d 102.

This was a suit brought by the Government for money, alleging fraud in the matter of purchase by the defendant,

a non veteran, of trucks ear marked for priority to veterans. The trial court found for the Government and the Circuit Court affirmed with a divided court. Judge Rives in applying the rule concerning failure to testify took pains to point out that this was a civil case. The burden was not as great as that in a criminal case. We refer Your Honors to the dissent by Judge Cameron from which we quote, p. 112:

> "Finally, the majority would affirm the lower court because the defendant did not take the stand to testify. Certainly the Court below did not mention in its findings that it indulged any presumption arising therefrom; and this Court ought not to prop up those findings by, itself, raising the presumption. But even if it were proper so to raise it, the presumption has no validity here."

So in the *Daniel* case we have a case in which the trial court did not mention the rule and the Circuit Court made use of it in order to affirm. Your Honors will note that Judge Cameron objected to the use of the rule, which he termed a crutch, because the complaint charged fraud which requires clear proof.

United States v. Nowak, 133 F. Supp. 191, 196.

This is a communist case. Your Honors will note that the rule was merely mentioned in passing as Judge Picard distinguished the *Schneiderman* and *Baumgartner* cases. We quote p. 196:

> "It has been held even in criminal cases that ' * * * where the party having the burden makes a probable case on an issue as to which the accused has peculiar knowledge of the facts and may easily prove them and the prosecution cannot, an inference arises that the truth is with the prosecution.' *Williams* v. *United States;* 5 Cir., 170 F. 2d 319, 322.

> "Certainly defendant would know better than any other person what his state of mind was at a given time. Yet defendant did not see fit to testify nor did he offer to explain his failure to do so."

Your Honors will note the qualification put upon the rule and overlooked by Judge La Buy. The *Nowak* case was affirmed, 238 F. 2d 282, with no mention of the rule. The Circuit Court said that the findings of fact were supported by substantial evidence.

In *Nowak* v. *United States*, 355 U.S. 802, reversing the decree, Mr. Justice Harlan noted the absence of a vital link in the Government's proof. If Your Honors had seen fit to supply that link because of the failure of Nowak to testify, Your Honors would have followed the reasoning of the courts below in that case. It is our respectful contention that Judge La Buy regarded the failure to testify as sufficient to bolster up a weak case and to supply absent vital links in the chain of proof.

XX.

Summary of Argument.

Contrary to the claim made in the Brief for the Opposition, petitioner is not shown to have made a false assertion that he had never been arrested. 2

Our reason for not making a more detailed argument concerning this matter of arrest in our opening brief was that the District Court shifted away from the charge. Further the complaint limited the matter of falsity about arrest to the manner in which the Certificate of Arrival had been obtained. The Certificate of Arrival was issued before any papers were filed as a routine matter. There was no proof of any representations made in order to procure it. 3

The evidence leaves a void as to what petitioner may have said or represented at the time of entry. 3

We quote the rule to be applied where the desired inference is precluded by testimony to show that the fact does not exist. 4

The Trial Judge must have perceived the failure of proof above as no finding was made along the line of the charge in the complaint concerning an arrest. The evidence leaves a void as to what may have been said concerning arrest to the Preliminary Examiner. That official did not remember petitioner or the incident. The Designated Examiner was not produced. The Government left that which may have transpired before him as a blank. 4

We set out the question and answer concerning arrest and show that the answer "No" may have been truthful depending upon how the question was understood. The examiner did not remember the petitioner or the incident. 5

We reply to the argument that another man was in fact Paul Maglio. This assumes that there could be only one Paul Maglio. We cite a case on the use of the name of another. 5

We reply to the argument which assumes that there could be only one Felice De Lucia. We point out that our opponents here make assumptions not based on the record. 5

Judge LaBuy did not find that petitioner was the same person who had a criminal record. The evidence left a gap on this matter of identity. 6

The foreign documents concerning the conviction of a Felice De Lucia were never connected with petitioner, so in the absence of a finding by the Trial Judge it should have been presumed on appeal that Judge La Buy gave the foreign documents no heed. Therefore there was no evidence to show the arrest and conviction of petitioner. 8

We quote from the opinion of the Court of Appeals to show that that Court added to the findings. The addition had no support in the evidence. 9

We cite some cases on the effect of refusal on the part of the trial judge to find facts. 9

We copy some rules to apply in the review of findings where the evidence is undisputed. 9

Our opponents have overlooked the cases cited by us to show that Your Honors in a case such as this will re-examine the record. 10

We request Your Honors, in re-examination to bear in mind the significance of the absence of findings. 10

Every time the Trial Judge found a gap in the chain of evidence the case was treated as if petitioner were an alien or an applicant for naturalization. 11

Our opponents argue that petitioner employed a scheme by which he requested change of name so that any inconsistencies in identity might be obscured. 11

We reply that from the circumstances it is more reasonable to believe that petitioner acted legally and in good faith. 11

We quote the rule to be applied where the evidence admits of two inferences. 14

We reply to the argument that the use of another name thwarted investigation. Petitioner was compelled to use the name under which he entered. His request for change invited inquiry. 15

We quote from the testimony of Examiner Jordan to show that the matter of name was no doubt discussed during preliminary examination. 16

We argue that a presumption arises against the Government. Mr. Rando, acting at the request of the Passport Division, made an investigation in Italy. Although he produced many records, he omitted and did not account for the record concerning the passport and visa of petitioner. 17

We point to circumstances to show that the prosecutor first filed his complaint without evidence depending on pre-trial proceedings. Then after he saw that petitioner did not intend to cooperate, he commenced his hunt for other evidence. 17

Mr. Rando must have had enough information from the Preliminary Form to put him on the trail of petitioner through France. The failure of the Government to show what Mr. Rando learned should create a presumption against its case. 18

The failure on the part of the prosecutor to ask Mr. Rando what he had learned from the records of the American Counsel should create a presumption that such evidence if produced would have contradicted the theory of the Government. 18

We compare this case with a suit in equity to set aside a judgment and set out some of the rules applicable when evidence is claimed as newly discovered. 19

We cite a case where it has been held that plaintiffs cannot select what they will reveal and then expect equitable relief. 21

We point out gaps in the proof relative to that which may have occurred if the petitioner ever did appear before Designated Examiner McKay. 22

The death of Mr. McKay did not relieve the Government from the production of other evidence to show what may have taken place before Examiner McKay. The prosecutor preferred to rely upon speculation and inferences from so-called custom. 22

We point to the testimony of Mr. Fish who signed as a witness to show that it is probable that the so-called usual procedure was not followed in this case. 22

We show how a finding concerning the lack of knowledge on the part of Mr. Fish is based upon evidence which gives rise to another inference, *i.e.*, the custom was not followed— 24

We point to a number of bits of evidence available to the Government and not produced which may have shown that which took place in the Naturalization Court. 25

We quote from the opinion of the District Court concerning use of a name and point to lack of proof in support. 26

We copy a few paragraphs from the complaint to show failure of proof and argue that the pleader must have known there could be no supporting proof. 27

We advance a theory based upon the failure on the part of the prosecutor to prepare the case for the Government. First he relied upon pre-trial proceeding and after petitioner refused, he concluded that the Government could rely upon an inconclusive case. 27

We furnish reasons for our claim that the prosecutor filed a complaint containing allegations known by him to have been false. 28

There is no evidence that petitioner did not explain the use of two names, first to the Examiners and then to the Naturalization Court. The circumstances proved indicate that explanations were in fact made. 29

We review the cases cited by Judge La Buy on the matter of the use of an assumed name in order to show that they are not in point. 32

The findings concerning use of name are entitled to no weight because Judge La Buy misconceived the law applicable. 32

We quote from a case to show the law applicable in the matter of securing a visa relative to representations. 41

The Government proved a case for petitioner while attempting to prove its case. 42

The Examiners who testified did not remember petitioner or the transaction. The Government attempted to prove a false answer as to arrests by certain markings on the papers coupled with proof of custom. This proof was insufficient to warrant the inference drawn here by the Attorneys for the Government. 42

We show that the courts below drew unwarranted inferences from proof of so-called custom. 43

The Government undertook to prove that petitioner deceived the Examiners and consequently they recommended citizenship. The proof failed. There was no evidence from which to conclude that the Naturalization Judge considered anything submitted by the Examiners. 45

We quote from the opinion to show that Judge La Buy relied upon custom. We quote a rule of law to be applied when a judge makes a finding where the evidence indicates the contrary. 50

The refusal of the Court of Appeals to reject the findings based upon custom creates a confusing conflict of opinion. 52

The Court of Appeals misconstrued one of our propositions and consequently failed to pass upon our claim that it was error to give the evidence of custom probative value— 53

The District Court stated abstract principles of law concerning failure to reveal a criminal record without findings to make such abstract principles applicable. 54

We reply to the notation about concealment of a criminal record. Our opponents blow hot and cold in concluding that meant by Judge La Buy. When it suits them, they claim that Judge La Buy merely mentioned a proposition but did not make use of it. On the other hand, where Judge La Buy has merely announced a rule of law without application of it, our opponents proceed to apply it for the court. 56

In a denaturalization case, as in a criminal case, the Government is limited to the matters charged in the complaint. This Honorable Court will reject haphazard general findings made below. 56

The Court of Appeals in holding that it was bound by the findings of fact made by the District Court failed to heed admonishments of this Honorable Court. 57

Petitioner demurred to the evidence. Your Honors need not be concerned with credibility. There being several inferences deductible from the facts the Government has not maintained the proposition upon which plaintiff would be entitled to a decree— 58

The order of naturalization entered in 1928 is *res judicata*. The Government is estopped and the District Court was without jurisdiction to denaturalize petitioner on the grounds said by Judge La Buy to support the decree. 59

Our opponents have erected a man of straw. We did not claim that Congress had no power to provide for the revocation of citizenship by misrepresentation, and concealment of material facts, provided the statute is properly construed and applied. We reply to that said by the Attorneys for the Government concerning our use of the *Knauer* case. 60

We set out some of our reasons for presenting this reply brief and endeavor to explain how it seemed necessary to go into such detail concerning the record and the points urged. 61

We set out examples from the Brief in Opposition to show that our opponents have fuzzed up the issues. 62

We repeat some questions left unanswered by our opponents as follows:

"(a) What concealments were made?

(b) What misrepresentations were made?

(c) To whom were they made?

(d) How did their making result in the entry of the order of naturalization?"

..... 65

We argue concerning the value of the judgment of the Naturalization Court and assert that the courts below erred in not accepting it as against the evidence produced. 66

We quote from the complaint and argue that Your Honors should disregard the findings made in contradiction of the record made when petitioner was admitted. 67

Without the testimony of Examiner McKay or some one who knew what was done by Mr. McKay the Government had no case on its own theory. 68

Examiner Jordan gave no testimony from which it could be inferred that he had been deceived. 69

Examiner Jordan did not remember the person. The United States Attorneys did not ask him if he had talked to petitioner or if he had examined any report made by Mr. McKay or any other papers or records.

This line of questioning was not followed up, no doubt because Mr. Jordan said he knew only that which he read on the form called a Face Brief. That amounts to nothing. 69

We point to deficiencies in the proof concerning that said to the Examiners. 70

We quote from a case dealing with the statute relating to a situation where the findings of the Examiner are of no consequence. We have such a case at bar. .. 72

We copy the order of court admitting petitioner which order has not been given the attention it merits. 75

We reply to the attack made by our opponents on the manner in which we argued in our opening brief. .. 77

Mr. Jordan had been with the Naturalization Service since 1912. No doubt he knew very well that there was no custom or regular procedure followed, the same in every case. He must have known that the prosecutor was trying to get him to read meaning into the check marks and other notations not warranted by the facts. Your Honors will perceive that he practically said so if his deposition is studied. 79

We reply to the assertion by our opponents that the evidence is clear, unequivocal and convincing. 80

The value of the constitutional privilege was destroyed. De Lucia was penalized for reliance upon his privilege. When the Court of Appeals perceived that the District Court had erred and reversed the contempt case, the Appeals Court should have perceived that the error also made mandatory the reversal of the decree in the case at bar. 81

We point to the manner in which our opponents seek to water down our question concerning the abuse of the Federal Rules of Civil Procedure below. 82

We show from the record that Judge La Buy did throw into the scale the fact that petitioner claimed privilege at pre-trial. 82

We quote from that said by former Justices of this Honorable Court concerning the Fifth Amendment. ... 83

We examine some of the record in detail to show that Judge LaBuy did throw the pre-trial incident into the scale in making inferences from the evidence and lack of proof. 84

We quote from the opinions below concerning failure to testify and reply to our opponents who assert that they find ample support. 85

We quote from the opinion of the Court of Appeals in the contempt case and point to the deficiencies in the reasons given for reversal. 86

We argue that the District Court erred in reliance on the *Costello* case and point to the danger of allowing the opinions below to stand as encouragement for other prosecutors, in any desire to strip citizens of constitutional rights in denaturalization cases. 87

It is reasonable to conclude that if, when he filed his complaint, the prosecutor was in a position to prove his case, without compelling petitioner to become a witness against himself, the prosecutor would not have resorted to all of this pre-trial procedure. If the maker of the good cause affidavit had been truthful, he would have said that he was suspicious of petitioner and hoped to be able to later build a case against him. Good cause to institute a suit can not exist in the absence of evidence to prove the charge. 88

We quote from a late case in order to illustrate the tendency of some prosecutors to abuse their power in the matter of interrogation of citizens. 89

We respectfully submit that in order to safeguard the constitutional rights of citizens it is not only necessary for this Honorable Court to remind prosecutors and some judges of these rights, but Your Honors should, in the interest of the administration of justice, apply the principles to situations created by new methods of abuse. In the words of Chief Justice Warren, Your Honors should "apply to ever changing conditions the never changing principles of freedom". 90

The denial of certiorari here will no doubt leave the opinion of Judge La Buy and of the Court of Appeals as authority for the prosecutor to first file his complaint and to then seek his proof from the mouth of the defendant. A defendant refusing will not only be punished with a contempt sentence, including jail, but the fact of refusal will be regarded as enough to convert a weak case into a one of clear convincing proof. 90

We comb over the record in order to determine, if posisble, what may have influenced Judge La Buy and argue that the District Court leaned heavily on the refusal of petitioner to testify at pretrial, in order to bolster up the case for the Government. 91

We quote from opinions of this Honorable Court on the subject of constitutional rights. 97

We point to the danger encountered when courts fail to distinguish between a denaturalization case and cases involving aliens. 99

We reply to the argument made by our opponents that the matter of the abuse of Federal Rules is not properly before this Honorable Court. 100

The Court of Appeals erred in approving the application of a sanction by the District Court because of failure to testify. 101

We analyze the cases cited by Judge La Buy to show that the Trial Judge was misguided concerning the rule announced in reference to silence. 102

XXI.

Conclusion

To borrow from the language of eminent counsel in *Peirce* v. *New Hampshire*, 46 U.S. 504, 563, we conclude by saying that instead of receiving, as he was entitled to, the protection of the government, his constitutional rights have been trampled upon. Petitioner has, in the last resort appealed to this tribunal for redress, in the hope that here at least the law may be administered, right defended and justice maintained uncontaminated by the breath of temporary diseased sentiment, which in its misguided and abortive attempts at reform essays to eradicate evil by making use of tax laws, Congressional hearings, and laws of immigration in order to harass individuals placed by the authorities on some sort of list. We leave this case in the hands of Your Honors confident that petitioner, in common with all the other citizens of this whole country, will ever find in this Honorable Court a full and ample protection for his constitutional rights, against which the waves of fanaticism, as well as faction, may beat harmlessly.

Respectfully submitted,

WM. SCOTT STEWART
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 264

PAUL DE LUCIA,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for Rehearing

WM. SCOTT STEWART
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OCTOBER TERM, 1958

No. 264

PAUL DE LUCIA,
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UNITED STATES OF AMERICA.

Petition for Rehearing

May it please the Court:

The affidavit filed in support of the complaint was insufficient, consequently the District Court lacked jurisdiction.

We quote from the opinion of the Court of Appeals (Our Petition, p. 76, 256 F. 2nd 487, 488:

"Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under pretense that it shows good cause, affiant's as-

sertions therein are not dependent upon his knowledge, and that; although he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his 'opinion as to what may be shown by some files.'

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, 355 U.S. 802. In accordance with that decision, we hold the Gordon affidavit sufficient."

We respectfully submit that *Nowak* does not answer the contentions made in the case at bar and therefore the Court of Appeals erred. Mr. Justice Harlan said in *Nowak*:

"The affiant was an attorney of the Immigration and Naturalization Service who swore that the allegations made in his affidavit were based upon facts disclosed by official records of the Naturalization Service to which he had had access. In substance the affidavit set forth the same matters upon which the District Court's later decree of denaturalization was based, and showed with adequate particularity the grounds on which the Government's suit rested. Sworn to as it was by a responsible official of the Naturalization Service, we consider that the affidavit satisfied the purpose of § 338 (a) to protect those proceeded against from ill-considered action. See *United States* v. *Zucca*, *supra*, at 99-100."

In *United States* v. *Minnerich*, 250 F 2nd 721, 725., Judge Finnegan said:

"The proposition which the government, in these denaturalization cases, desires to prove is that citizenship was, at an earlier date, procured under circumstances described in § 340 authorizing annulment of the order admitting an alien to citizenship. The affidavit, then, should reveal facts offered to establish that proposition. See, *e.g.*, I Wigmore § 2 (3rd ed.

1940). This simply means disclosing some of the premises from which the conclusion is drawn, by the United States Attorney, that § 340 proceedings are warranted. From such an affidavit an experienced judge should be able to detect a United States attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard."

In the case at bar, we submit, that if the District Judge had applied such test it would have been seen that the affidavit was defective, for reasons not involved in *Nowak*.

(a) The affidavit based the conclusion of good cause on statements known by the affiant to have been false. The very foundation of the complaint, as to matters jurisdictional, were abandoned at the trial, *i.e.*: (1) no certificate of arrival; (2) no attachment.

(b) The evidence disclosed that the files examined by affiant could not have contained the information gathered subsequent to the making of the affidavit.

(c) The affidavit, complaint and evidence show that the suit was first commenced and then a search was made for proof.

In our argument, intended to convince Your Honors that the record shows an abuse of the Federal Rules of Civil Procedure, we pointed to the defects in the affidavit. If Your Honors now deem the jurisdictional point a substantial ground available to petitioner, we respectfully refer Your Honors again to our petition, pp's. 22, 24 and Reply, pp. 17, 27. We also respectfully refer to our briefs filed in the Court of Appeals and certified here. Please see Appendix IV, Brief for Defendant in Contempt Case.

Intervening circumstances of substantial effect.

Your Honors denied certiorari in the case at bar on October 13, 1958. On October 20, 1958 there was published the opinions rendered in *United States* v. *Fisher*, 258 F. 2nd 362. From such opinions Your Honors will perceive that the Judges of the court below differ concerning the importance of a proper affidavit. Judge Schnackenberg, who wrote the opinion in the case at bar, dissented from Judge Finnegan and Judge Parkinson. In our petition in the case at bar, (pp. 32, 48) we requested Your Honors to take jurisdiction because of the difference of view between Judge Finnegan, as expressed in *United States* v. *Minnerich*, 250 F. 2nd 721 and that expressed by Judge Schnackenberg in the case at bar. (Our Reply pp. 28, 45, 59, 71). Judge Parkinson served on all three panels, *Minnerich*, *De Lucia* and *Fisher*. Your Honors will perceive, from the dissenting opinion rendered by Judge Schnackenberg in *Fisher*, that the Judges in the court below differ also concerning the meaning of *Mattes* v. *United States*, 356 U.S. 256.

Your Honors will also note from the opinions rendered in *United States* v. *Diamond*, 255 F. 2nd 749, that the Judges of the Ninth Circuit differed. The order of affirmance of the District Court dismissing the actions was affirmed by this Honorable Court, 78 S. Ct. 715.

We respectfully submit that these differences and the consequent confusion, call for the exercise of the supervisory power vested in this Honorable Court.

Illegal procurement of naturalization was not ground for denaturalization in proceeding which was not yet pending on effective date of 1952 Act.

In *United States* v. *Miller*, 152 F. Supp. 27, the District Court struck the paragraph from the complaint containing the charge of illegal procurement. We respectfully refer Your Honors to the opinion of Judge Carter for a review of the authorities. In our petition, in making another point, p. 32, we complained of the failure on the part of the courts below to clearly define the basis of the decree. Here in our petition for rehearing, we respectfully request Your Honors to find from the record that the courts below regarded the certificate as having been illegally procured. It must then follow that the law conferring jurisdiction has been repealed. After the effective date of the McCarran Act, as to actions not then pending, illegal procurement was not continued as a ground for denaturalization.

We respectfully pray for a rehearing and the granting of certiorari.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for Petitioner

Certificate of Counsel.

WM. SCOTT STEWART, counsel for petitioner respectfully certifies that the above petition for rehearing is presented in good faith not for delay and is restricted to the grounds specified in Rule 58.

WM. SCOTT STEWART
Counsel for Petitioner